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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1613

CALLMAN GOTTESMAN, MARIA MATTIELLO and PAUL J. PEYSER,

Petitioners,

v.

GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS & COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: April 22, 1971.

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GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS & COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Callman Gottesman, Maria Mattiello and Paul J. Peyser, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered January 4, 1971 in this cause.

Opinions Below

The opinion of the Court of Appeals is reported in 436 F. 2d 1205, and is printed in Appendix A, *infra,* pages A1-A12. The opinion of the District Court on remand, is reported in 310 F. Supp. 1257, and is printed in Appendix A, *infra,* pages A13-A20. The opinion of the Court of Appeals on the first appeal is reported in 414 F. 2nd 956, and is printed in Appendix A, *infra,* pages A21-A39. The post-trial opinion of the District Court is reported in 279 F. Supp. 361, and is printed in Appendix A, *infra,* pages A40-A89. The pre-trial opinion of the District Court is reported in 221 F. Supp. 488, and is printed in Appendix A, *infra,* pages A90-A99.

Jurisdiction

The judgment of the Court of Appeals was entered on January 4, 1971. A timely petition for a rehearing *in banc* or for certification of issues to this Court, pursuant to 28 U.S.C. Section 1254(3), filed January 18, 1971 was denied on February 1, 1971 because eight of the nine active judges had disqualified themselves.[1] This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 62 Stat. 928, 28 U.S.C. 1254(1).

Questions Presented for Review

In a case where the basic facts are not in dispute; where the trial, the first appeal, the remand and the second appeal involved a determination of the *fact* of damage only, as distinguished from *quantum* of damages; and where du Pont[2] admitted that its antitrust violation and the underlying facts determined by this Court continued during the period in suit[3]:

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[1] The order reads: "All of the active judges of this Court having disqualified themselves for consideration of the within action, with the exception of the Honorable Leonard P. Moore, Circuit Judge,

"It is hereby ordered that the petition for rehearing in banc or alternate relief be and it hereby is denied."

Ten copies of the petition have been lodged with the Clerk of this Court.

[2] Respondents are referred to herein as General Motors and du Pont, respectively.

[3] At the conference on remand on October 31, 1969, counsel for du Pont said (Tr. 16): ". . . we will not contest the determination by your Honor that there was a violation of Section 7 during the 1950s. In the light of the Supreme Court opinion, *as long as it stands and is law,* we think it would be ridiculous for us to urge your Honor to the contrary." (Emphasis added).

In its brief on appeal below (p. 54) du Pont stated: "Proof of a continuation during the period of this case of *the same facts that underlie the Supreme Court decisions* would warrant a finding that du Pont's continued ownership of General Motors' stock violated Section 7 of the Clayton Act, *a finding we do not contest.*" (Emphasis added).

1. Whether the holding of this Court in the government case that du Pont "purposely employed its stock . . . to entrench itself as the primary supplier", resulting in "the insulation from free competition of most of the General Motors' market in automobile finishes and fabrics"[4], can be turned upside down in a private antitrust suit and construed to mean exactly the opposite[5] as the premise for the conclusion below that du Pont's established and admitted antitrust violation did not have any impact on General Motors and did not constitute an injury to its business?

2. Whether du Pont's stock interest and the consequent close intercompany relationship, resulting in the insulation from free competition of most of the General Motors market in automotive finishes and fabrics and depriving General Motors of its right to do business in a free and competitive market, "in itself necessarily had an impact on [General Motors] and constituted an injury to its business"[6]?

3. Whether the holding below to the effect that General Motors was as well off with most of its market in automotive finishes and fabrics insulated and foreclosed by du Pont from free competition as it would have been without such insulation or foreclosure conflicts with the applicable decisions of this Court?

4. Whether the showing by du Pont's contemporaneous records that during the pendency of the government suit du Pont actually *increased* its share of General Motors finishes *requirements* to an average of 74% from the 67%

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[4] *United States* v. *E. I. du Pont de Nemours & Company*, 353 U. S. 586, 366 U. S. 316.

[5] Here the Courts below concluded that du Pont's sales to General Motors of automotive finishes and fabrics in volume amounting to most of its automotive production were "completely unrelated to the stock interest that du Pont held in General Motors." A89, 279 F. Supp. at 385; A12, 436 F. 2d at 1212 n. 27.

[6] *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 120.

in 1946 and 68% in 1947 found by this Court; charged higher prices and obtained higher profit margins on sales of all finishes and fabrics to General Motors than on sales to Ford, Chrysler and other automotive manufacturers; doubled and even tripled its volume of sales to General Motors; and sold a *decreasing* percentage of its production of finishes and fabrics to other automotive manufacturers because du Pont's prices were too high—constituted proof of *some* damage?

5. Whether proof of *some* damage to General Motors was shown by the uncontroverted expert testimony of petitioners' economist[7] that du Pont's share of the General Motors market for finishes and fabrics and du Pont's ability to obtain higher prices, mark-ups, and profit margins on the entire gamut of such sales than on sales to other automotive manufacturers reflected du Pont's power to obtain non-competitive higher prices in a sheltered and insulated market?

6. Whether the affirmance below of the District Court's decision that du Pont had, but did not exercise, its control over General Motors' purchases of automotive finishes and fabrics, *before*[8] *or after 1950,* conflicts with and in effect constitutes a reversal of the very basis of the antitrust violation determined by this Court.[9]

7. Whether as a result of du Pont's "deliberately calculated purchase of a control"[10] which it "purposely em-

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[7] Tr. 7985, 8066, 8076. Du Pont's only economic expert admitted that his testimony to the contrary "assume[d] the absence of control on the part of du Pont over General Motors' buying policies of automotive fabrics and finishes" (Tr. 9693).

[8] A67, 279 F. Supp. at 375.

[9] At the second conference on remand on March 13, 1970 the District Court said (Tr. 41): "That happens to be the great problem in this case, both in the Supreme Court and the Court of Appeals, the internal inconsistencies of the language."

[10] *American Tobacco Co.* v. *United States,* 328 U. S. 781, 810.

ployed . . . to pry open the General Motors market'"[11] which "had led to the insulation from free competition of most of the General Motors market . . .'"[12], du Pont's "power and its exercise must needs coalesce" when du Pont "began to sell at all'"[13], and thus had to inflict injury since the "size of the share of the market foreclosed" or insulated was substantial, and since that was "the very nature and purpose of the arrangement'"[14]?

8. Whether the use by du Pont of its stock interest in General Motors to insulate for itself most of the General Motors market in automotive finishes and fabrics, resulting in du Pont's established and admitted antitrust violation, entitled the plaintiffs to recover for "unlawful deprivation" or "proven invasion" of its right to do business in a free and competitive market[15]?

9. Whether, having purported on remand to accept as *prima facie* evidence the determination by this Court in the government case that "du Pont used its stock interest to entrench itself as the primary supplier" to General Motors which "led to the insulation from free competition of most of the General Motors market'"[16], the District Court could properly conclude the contrary "in the absence of clear evidence of its termination'"[17], in the face of

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[11] 353 U. S. at 606.

[12] 366 U. S. at 318-319.

[13] *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 427; *American Tobacco Co.* v. *United States*, 328 U. S. at 813.

[14] *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 328-329, 332 n. 55.

[15] *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. at 120; *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 439 n. 9; *Bigelow* v. *RKO Radio Pictures Inc.*, 327 U. S. 251, 265.

[16] A18, 310 F. Supp. at 1259-1260.

[17] *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. at 119.

du Pont's admissions that its antitrust violation, and the facts underlying the decisions of this Court in the government case, continued during the period in suit?

10. Whether the conclusion below that du Pont's sales to General Motors of most of its total automotive production were "completely unrelated to the stock interest that du Pont held in General Motors" constituted in effect a holding that du Pont's stock interest in General Motors was "solely for investment"[18], or merely another way of holding, contrary to the determination of this Court and du Pont's own admissions, that du Pont did not violate the antitrust laws?

11. Whether the exclusive method prescribed below for proving *fact* of damage by showing through purported competitors of du Pont "who were never afterwards in serious contention"[19] that they "could have supplied . . . at a price lower than that paid by General Motors to du Pont"[20] conflicts with the applicable decisions[21] of this Court from *Bigelow* in 1946 to *Zenith II* in 1971?

12. Whether the conclusion below that the sales by du Pont to General Motors of 86% to 96.2% of its total production of automotive fabrics and finishes[22] were "arm's length transactions under competitive conditions"[23], despite the recognition that du Pont "had the power to con-

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[18] 353 U. S. at 589, 597-598, n. 25; 366 U. S. at 329.

[19] 353 U. S. at 602.

[20] A10, 436 F.2d at 1211; A16, 310 F. Supp. at 1259; A76, 279 F. Supp. at 379.

[21] *Bigelow* v. *RKO Pictures, Inc.*, 327 U. S. 251, 264-265; *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 698-699; *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, (February 24, 1971, No. 80—October Term 1970), Slip Op. 1, —— U. S. ——.

[22] A77, 80, 279 F. Supp. at 380-381.

[23] A12, 436 F. 2d at 1212 n. 27; A89, 279 F. Supp. at 385.

trol [General Motors]'"[24] and despite the fact that the "heart" of du Pont's established and admitted antitrust violation was "intercorporate combination and control"[25], conflicts with the applicable decisions of this Court that in the context of domination and control there *cannot* be arm's length dealing?

Statutory Provisions Involved

The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; Section 7 of the Clayton Act, 15 U.S.C. § 18; Section 4 of the Clayton Act, 15 U.S.C. § 15; Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a).

The foregoing statutes are printed in Appendix B, *infra*, pages B1-B2.

Statement of the Case

Introduction

This derivative action by petitioners as General Motors stockholders against du Pont arose out of, and was commenced in 1957 in the midst of, the government suit following this Court's first decision[26] holding du Pont in violation of the antitrust laws and prior to this Court's second decision in 1961 ordering divestiture to break du Pont's "hold" on the General Motors market which "induce[d] General Motors to favor du Pont".[27]

Petitioners claim damages for violation of the antitrust laws and fiduciary obligation.

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[24] A52, 279 F. Supp. at 368.

[25] 353 U. S. at 605-606; 366 U. S. at 329, 331-332, n. 15; *North American Co.* v. *Securities & Exchange Commission*, 327 U. S. 686, 692-693.

[26] 353 U.S. 586.

[27] 366 U.S. 316, 331-332.

Accordingly, in view of the holding of this Court that "[t]he potency of the influence of du Pont's 23% stock interest is greater today"[28], there is a common and identical foundation of undisputed basic facts underlying both this private suit (covering the evidentiary period from 1949-1960) and the government suit in which this Court referred to the growing substantiality of the relevant market up to 1955.[29]

Additional undisputed basic facts from du Pont's contemporaneous records were added to the common core of operative facts showing the expanded exercise of du Pont's power—during the very pendency of the government suit.

As detailed hereinafter, du Pont doubled and tripled its sales to General Motors of automotive finishes and fabrics. More important, du Pont's share of General Motors' requirements for finishes rose to an average of 74%[30] from the 67% in 1946 and 68% in 1947 found by *this* Court.[31]

Likwise, du Pont increased the percentage of its production of automotive fabrics sold to General Motors to 86% (from the approximate 80% found by *this* Court), and increased the percentage of its finishes production sold to General Motors to 96.2% in 1959 from the approximate 90% found by *this* Court.[32]

Du Pont's contemporaneous records show, and it is undisputed, that all sales of finishes and fabrics to General Motors produced higher profit margins for du Pont than did sales to Ford, Chrysler and others.

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[28] 353 U.S. at 607 n. 36.

[29] 353 U.S. at 596, n. 16.

[30] A54, 279 F.Supp. at 369; A25-26, 414 F.2d at 959.

[31] 353 U.S. at 596.

[32] A77, 279 F.Supp. at 380; A25-26, 414 F.2d at 959.

For example, it is admitted that du Pont obtained more than twice the profit margin over mill cost (56.8% vs. 26.7%) on "lacquer" topcoats sold to General Motors than on "enamel" topcoats sold to others. Indeed, the trial court found that du Pont charged about a dollar more per gallon for "lacquer" topcoats sold to General Motor than for "enamel" topcoats sold to other automobile manufacturers[33] although they cost about the same to produce,[34] and it was admitted that both were made on the same machinery in thousand gallon batches.[35]

Du Pont did not begin to divest itself of General Motors stock until 1962, and divestiture was completed in 1965. Accordingly, during the period in suit and while its violation of § 7 admittedly continued, du Pont increased the exercise of its power, increased its market penetration, increased both profit margins and volume, during which time the management of General Motors at every stage actively opposed this action for the benefit of its shareholders.

Thus, the government case and this case proceeded against a background of the increasing exercise of du Pont power. This case added to the undisputed facts in the government case additional undisputed basic facts (from du Pont's contemporaneous records) of higher mark-ups, higher prices and larger profit margins on sales to General Motors than du Pont was able to obtain on sales to other automotive manufacturers—in short, specific injury to General Motors.

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[33] A70, 279 F.Supp. at 377.

[34] A78, 279 F.Supp. at 380.

[35] Du Pont's expert witness, Henry Lauve, who had been a styling expert for General Motors and was present at the annual color selection meetings hereinafter referred to (*infra*, p. 27), had ceased employment with General Motors at the time of trial. He was employed as an independent consultant for Citroën and was responsible for "complete styling, inside and out" (Tr. 4851). Although Mr. Lauve owned and drove a Citroën, he did not know whether it was painted with lacquer or enamel (Tr. 4850-4853).

The affirmance on the second appeal by an *ad hoc* panel misconceived prior decisions of this Court and undermines the effectiveness of the private suit in the enforcement of the antitrust laws.

Proceedings Below. All the active Judges of the Court of Appeals for the Second Circuit, save one, having disqualified themselves,[36] this petition is to review a decision of an *ad hoc* panel comprised of one active judge, a retired district judge, and a retired judge from another circuit.

The decision after remand and on the second appeal affirmed the dismissal of petitioners' claims with respect to the sales of automotive finishes and fabrics by du Pont in violation of the antitrust laws and its fiduciary obligation for the same reasons given by the district judge in his post-trial opinion.

The first appeal was heard by a panel of Judges Waterman, Smith and Feinberg who vacated the judgment for "fundamental" error and remanded with instructions.[37]

After commencement of this action June 12, 1957, several other cases were consolidated with it on July 3, 1958 and assigned to Hon. Charles M. Metzner for all purposes. An amended consolidated complaint was filed in November, 1959.

On May 10, 1961 Judge Metzner ruled that the earliest stockholding of plaintiffs was May 4, 1950,[38] shortly *after the commencement* of the government suit in 1949 which continued pending at least until March 1, 1962 when Judge La Buy entered final judgment in the government suit.

On February 25, 1963, less than one year following final judgment in the government suit, petitioners' counsel filed

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[36] *supra*, p. 2 n. 2.

[37] A21, 414 F.2d 956.

[38] 28 F.R.D. 325.

a new suit[39] in which the stockholdings of the new plaintiff (Schiff) in General Motors arose on or prior to November 25, 1936, more than 14 years prior to stock ownership in this *Gottesman* case, and seeking relief for *that period* as well.

On June 24, 1963 Judge Metzner ruled that the commencement of the *Schiff* action "is clearly an attempt to bring stock ownership back to the earliest date available under the *appropriate* statute of limitations."[40] (Emphasis added) Then, notwithstanding the statutory right encouraged by Congress, he enjoined prosecution of the *Schiff* case until final determination of this *Gottesman* case. That was done by granting motion made by du Pont (under Rule 6(b), F. R. Civ. Pr.) to extend its time to answer until 30 days after final determination. Thereafter on April 15, 1964 Judge Metzner denied motions in both cases to consolidate.

In the meantime, having uprooted this case from its foundation in the government suit and split the time period, Judge Metzner in a pre-trial decision "compartmentalized"[41] the case into antitrust years, as it were; denied petitioners any "solace" from the government suit; held that "*present* plaintiffs may only recover damages *for acts occurring after May 4, 1950*[42] (Emphasis added); held "[t]here can be no claim for money damages for a violation of section 7"; and further held that the decree in the government suit was limited to "historical purposes and background material"[43].

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[39] *Schiff, individually and as Executrix, etc.* v. *General Motors and du Pont,* S.D.N.Y., 63 Civ. 533.

[40] Decision not reported; mandamus den. 331 F.2d 963; cert. den. 379 U.S. 881.

[41] See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 699.

[42] See Zenith II, *supra,* Slip Op. 5-6, 10-11, —— U.S. ——.

[43] A90, 91, 98, 99, 221 F.Supp. 488, 490, 493, 494. Interlocutory appeal was denied, and certiorari which would have involved a review of the *denial* of the interlocutory appeal under 28 U.S.C. 1292(b) was denied by this Court. 379 U. S. 882.

The District Court, sitting without a jury, tried the case November, 1966 through January, 1967[44] and on December 13, 1967 dismissed the claims relating to finishes and fabrics.[45]

In view of the "fundamental nature of the error" the Court of Appeals on the first appeal thought that Judge Metzner should be given the "opportunity to reconsider" and, accordingly, remanded with instructions.[46]

Upon remand, the district judge adhered to his prior "conclusions"[47]. On the second appeal his conclusions were affirmed January 4, 1971,[48] and timely petition for rehearing in banc was denied February 1, 1971.[49]

Contradiction of this Court by the Courts below. Pointing out that there was no "significant dispute as to the basic facts", this Court held: "The basic facts found by the District Court demonstrate the error of its conclusions."[50]

In view of Judge's Metzner's refusal to give *prima facie* recognition to the first decision of this Court, and any recognition whatever to its second decision,[51] and because the only "solace" permitted was for "historical purposes and background material," petitioners were compelled physically to replow the same field, introducing government evidence in order to include *identical* undisputed basic facts in this record.

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[44] Petitioner Gottesman's affidavit of prejudice under 28 U.S.C. 144 was rejected by Judge Metzner; ten copies of it have been lodged with the Clerk of this Court.

[45] A40, 279 F.Supp. 361.

[46] A31, 39, 414 F.2d 956, 961, 965.

[47] A13, 19, 310 F.Supp. 1257, 1260.

[48] A1, 436 F.2d 1205.

[49] A1, 436 F.2d 1205; *supra*, page 2, n. 2.

[50] 353 U. S. at 598 and n. 28.

[51] A95-96, 221 F.Supp. at 492.

These *identical* basic facts led Judge Metzner to contradict this Court by duplicating Judge La Buy's conclusions in the government case in all respects except one,[52] although this Court in 1961 said its first decision "held that du Pont's acquisition of the 23 percent of General Motors stock *had led* to the insulation from free competition of most of the General Motors market in automobile finishes and fabrics . . ."[53] (Emphasis added).

It was the *use* of the stock that enabled du Pont to achieve its "commanding position." Indeed, "du Pont *purposely* employed its stock to pry open the General Motors market to entrench itself as the primary supplier of General Motors requirements . . ."[54] (Emphasis added).

Du Pont's "commanding position . . . was not gained solely on competitive merit." On the contrary, "lines of communication" and "surveillance . . . made an impressive impact upon purchasing officials."[55]

The higher percentage of General Motors' business of other suppliers in later years was "never high enough at any time substantially to affect the dollar amount of du Pont's sales . . . probably . . . in part because [General Motors'] requirements outstripped du Pont's production . . ." Actually, it was only in the later years 1947 and 1948 that "Fisher resistance," shielded by a voting trust, finally "collapsed."[56]

This Court illustrated: "Thus sprung from the barrier, du Pont quickly swept into a commanding lead over

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[52] Judge Metzner concluded du Pont had the "power to control" General Motors (A52, 279 F.Supp. at 368).

[53] 366 U. S. at 318-319.

[54] 353 U.S. at 589, 597, 598, 605, 606.

[55] 353 U.S. at 603, 605.

[56] 353 U.S. at 605.

its competitors, *who were never afterwards in serious contention.*"[57] (Emphasis added).

This Court's second opinion was equally explicit, and more emphatic. The past perfect tense, "*had led* to the insulation . . .," showed the requirement of a "competition-*restoring*" remedy. Since the voting of stock ". . . to induce General Motors to favor du Pont [was] the very result which we found illegal on the first appeal", divestiture was required because even the pass through might "be used to induce General Motors to favor du Pont products."[58] (Emphasis added).

In short, this Court refused to assume "contrary to all human experience" that pass through voting would not be directed "as strategically as du Pont itself *has done*" in the interest of du Pont. Pass through voting, or the power to transfer the vote, might "not exercise *as much influence* on General Motors as *did* du Pont when it held and voted the shares as a block." Even more, "the General Motors management, which over the years has become accustomed to du Pont's special relationship," might continue "*to favor du Pont products.*"[59] "Du Pont's competitors . . . might not try so vigorously to break du Pont's *hold* on General Motors' business."[60] (Emphasis added).

Therefore, the "competition-restoring" remedy had to be divestiture because "intercorporate combination and control"[61] was the "heart" of the "violation proved."[62]

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[57] 353 U.S. at 603.

[58] 366 U.S. at 318, 320, 331-332, emphasis added.

[59] This Court's note 15 reads: "For the significance of such long habit, see *North American Co.* v. *Securities & Exchange Comm.*, 1946, 327 U.S. 686, 693; *United States* v. *Imperial Chemical Industry*, D.C.S.D. N.Y. 1952, 105 F.Supp. 215, 236-237; Douglas, Democracy and Finance 33 (1940)."

[60] 366 U.S. at 331-332.

[61] This Court's note 11 reads in part: "See *Northern Securities Co.* v. *United States*, 1904, 193 U.S. 197; *Standard Oil Co. of New Jersey* v. *United States* 1911, 221 U.S. 1; *United States* v. *American Tobacco Co.*, 1911, 221 U.S. 106. . . ."

[62] 366 U.S., at 320, 323, 329.

Although this Court found that "Fisher resistance" persisted and "for years withstood the efforts of high ranking du Pont and General Motors executives" before it "collapsed" in 1947 and 1948 under du Pont "pressure,"[63] Judge Metzner was able to divine that the ascendancy of Mr. Sloan in 1923 wrought such a "distinct change"[64] that thereafter du Pont did not influence General Motors' purchasing.

Thus, upon the *identical* basic facts Judge Metzner concluded: "In summary no patterns of control by du Pont over purchases by General Motors have evolved in the period *prior* to 1950."[65] (Emphasis added.)

Upon all the undisputed basic facts Judge Metzner finally concluded, with the approval of the Court below: "The business relationships growing out of the sale of automotive fabrics and finishes by du Pont to General Motors were completely unrelated to the stock interest that du Pont held in General Motors."[66]

Undisputed Basic Facts

(1) Du Pont's Entrenched Market Share of General Motors' Business.

The determination in 1957 by this Court that [t]he potency of the influence of du Pont's 23% stock interest is greater *today*" was emphasized on the first appeal[67] but ignored on remand and by the *ad hoc* panel on the second appeal.

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[63] 353 U.S. at 604-605.

[64] A46-47, 279 F.Supp. at 365-366.

[65] A67, 279 F.Supp. at 375.

[66] A88, 279 F.Supp. at 385; A12, n. 27, 436 F.2d 1212, n. 27.

[67] A37, 414 F.2d at 964.

No one supplier was able to supply all of General Motors' requirements before 1950,[68] or after 1950 (Tr. 3199). General Motors "had to bring in more producers" (Tr. 6760).

In 1946 and 1947 du Pont sold General Motors 67% and 68% of its finishes requirements.[69] During the years covered by the case at bar, the percentage of General Motors' finishes requirements sold by du Pont to General Motors rose to an average of 74%.[70]

Du Pont sold 83% of its production of automotive topcoat lacquers to General Motors in 1947.[71] For the period 1949 through 1959 the percentage of du Pont's lacquer production sold to General Motors rose to about 99% (PX 76, 254). Lumping all types of automotive finishes together, the government case showed du Pont sold 90% of its total output to General Motors.[72] Here, the percentage rose to 96.2% in 1959.[73]

Du Pont's $12,224,798 sales of automotive finishes to General Motors in 1947[74] doubled, and even tripled, in subsequent years (PX 76, 254). Sales for 1949 through 1959 exceeded $300,000,000.

Du Pont's automotive fabrics sales to General Motors rose from $3,500,000 and $3,700,000 in 1948 and 1949, absorbing about 80% of du Pont's production,[75] to levels averaging nearly double that amount. From 1954 through 1959 General Motors absorbed 86% of du Pont's automo-

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[68] 353 U.S. at 605.

[69] 353 U. S. at 596.

[70] A26, 414 F. 2d at 959; A54, 279 F. Supp. at 369.

[71] 353 U. S. at 605.

[72] 353 U. S. at 596, n. 21; 126 F. Supp. at 295.

[73] A77, 279 F. Supp. at 380-381; A26, 414 F. 2d at 959.

[74] 353 U. S. at 596.

[75] 353 U. S. at 596, n. 22; 126 F. Supp. at 300-301.

tive fabrics production.[76] It exceeded $40,000,000 in the six-year period from 1954 to 1959.[77] (PX 76).

Walter F. H. Mattlage, General Manager of du Pont's Fabrics and Finishes Department, testified that after 1949 there was no change in the historical relationship between du Pont and General Motors with respect to allocations of automotive finishes and fabrics which du Pont expected to sell General Motors; that du Pont's production was always geared to General Motors' requirements; that du Pont kept track of the business it did with General Motors in relation to General Motors' production; and that du Pont assumed its historical position with General Motors would be maintained (Tr. 2174-2175; 2180-2181).

Du Pont's entrenched market share was calculated to, and did in fact, produce a close dollar correlation with General Motors' production of automotive units. Du Pont's records show that its sales of finishes increased or decreased in direct correlation with General Motors' automotive unit production—in some years identical to the very last "thousandth", or tenth of a percentage point.

For example, in 1960, the year before the divestiture decree, General Motors' automotive unit production increased 24.7%. At the same time du Pont's sales of finishes to General Motors increased exactly 24.7%. In the years 1956 and 1958, there was likewise an *exact* correlation.

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[76] A80, 279 F. Supp. at 381.

[77] Du Pont "destroyed through accident or inadvertence" (Response to Amended Interrog. 13, p. 26) records showing automotive fabric sales for the years 1949 through 1953 amounting to $29,889,000, as disclosed by its annual market surveys (PX 437-458). Although much of the information could have been reproduced by du Pont by an additional 1½ days work (Tr. 1286), the information was never produced.

In all other years the correlation was close (PX 577; Tr. 7990-8008, 8086). A compilation of du Pont's own records shows (PX 577):

YEAR TO YEAR INCREASES (DECREASES) IN DU PONT AUTOMOTIVE FINISHES SALES COMPARED TO PRODUCTION OF UNITS OF AUTO MANUFACTURERS

Year	G.M.		Ford		Chrysler		Total	
	Finishes	*Units*	*Finishes*	*Units*	*Finishes*	*Units*	*Finishes*	*Units*
1953	36.0%	45.0%	*Not available*		*Not available*		30.0%	32.0%
1954	(0.7)	0.1	4.0%	7.0%	(29.0)%	(40.0)%	(3.0)	(11.0)
1955	40.0	37.0	77.0	31.0	88.0	78.0	43.0	41.0
1956	(22.0)	(22.0)	4.0	(25.0)	(53.0)	(34.0)	(22.0)	(25.0)
1957	(6.0)	(8.0)	(35.0)	13.0	39.0	35.0	(7.0)	4.0
1958	(23.0)	(23.0)	(57.0)	(34.0)	(40.0)	(51.0)	(24.0)	(29.0)
1959	21.0	18.0	(2.0)	43.0	(12.0)	27.0	20.0	32.0
1960	24.7	24.7	90.2	6.5	0.9	34.6	24.9	17.2

The foregoing table (PX 577)[78] validated Mr. Mattlage's factual recital and demonstrated the basis for du Pont's expectancy that its entrenched market position for dollar sales to General Motors would continue. Sales to Ford and Chrysler, where price competition was admitted, showed no correlation with automotive unit production.

(2) Du Pont's Mark-Ups, Prices and Profit Margins Were Much Higher on All Products Sold to General Motors than on the Same or Comparable Products Sold to Other Automotive Manufacturers.

Du Pont's entrenched market share enabled it to extract higher prices and rates of profit on all products sold to General Motors than on the same or comparable products sold to other automotive manufacturers.[79]

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[78] Du Pont has admitted the accuracy of the figures in PX 577 which were compiled from its own records (Tr. 8086).

[79] Mr. Mattlage, General Manager of du Pont's Fabrics and Finishes Department, testified that du Pont had difficulty in obtaining business from Ford and Chrysler because "our prices were high". (Tr. 2197-2200). However, when asked whether there was any justification for the higher mark-up and higher profit on lacquer topcoats sold in large volume and almost exclusively to General

(*footnote continued on following page*)

According to Haywood E. Johnson, du Pont's National Sales Manager, Automotive, where du Pont had a "*preemp-*

(*footnote continued from previous page*)

Motors as against enamel topcoats sold in small quantities to Ford and Chrysler, Mr. Mattlage explained that General Motors "recognized its value, and they were willing to pay the price that it was worth to get those improvements." (Tr. 2164-2166).

Du Pont's mark-up over full replacement cost on lacquer topcoats sold almost exclusively to General Motors (PX 254) was 35% against 18% for enamel topcoats sold in small quantities to Ford and Chrysler. (Tr. 2399).

Haywood E. Johnson, du Pont's National Sales Manager, Automotive, explained it as follows (Tr. 2386):

> "THE COURT: That is your cost. But when you come to fix the price, do you charge a different price to a person who buys a lot of one product that goes through a production line as opposed to a customer who buys a small amount of what goes through a production line?
>
> "THE WITNESS: If a particular product is one that we think *we have a pre-emptive position* in and think that the customer will have good value and use, *then we may charge a higher mark-up* than if the reverse were true." (Emphasis added.)

Continuing, Mr. Johnson testified (Tr. 2399-2400):

> "Q For Duco and Lucite, what was the percentage rate mark-up for profit for that type of topcoat?
>
> "A As I recall, it was a little larger in the case of Lucite in relation to Duco.
>
> "Q What was the percentage in terms of per cent?
>
> "A My recollection is that in the case of Lucite, it would run in the neighborhood of 35 per cent, in the case of Duco, 25 to 30 per cent.
>
> "Q Was there any reason why the same rate was not used for enamel topcoats?
>
> "A THE COURT: Well, since you have got the mark-up in the record just now for Lucite and Duco, how about asking him what the mark-up for enamel topcoats was?
>
> "Q What was the mark-up for enamels, topcoats?
>
> "A In the neighborhood of 18 per cent.
>
> "Q Is there any reason why the rate for enamels, the rate of mark-up, was not the same as the rate of mark-up for Duco or Lucite?
>
> "A *The competitive position would not allow that kind of price.*" (Emphasis added).

(*footnote continued on following page*)

tive position . . . we may charge a *higher mark-up* than if the reverse were true." (Tr. 2386, emphasis added). This higher mark-up was obtained on low priced goods as well as on high priced goods.

It was conceded, and the Trial Judge found, that du Pont charged about a dollar a gallon more for topcoats sold to General Motors than it charged for topcoats sold to other automotive manufacturers[80] even though they cost about the same to produce[81] and were made on the same machinery in thousand gallon batches.

Du Pont's contemporaneous records show an 11-year average mark-up over *mill cost* of 56.8% on sales of topcoats to General Motors, more than double the 11-year

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(*footnote continued from previous page*)

Dr. Roy B. Davis, du Pont's Director of Marketing, confirmed the testimony of other witnesses as to mark-ups over full replacement costs. (Tr. 6172-6173). Dr. Davis also admitted that du Pont had to face vigorous price competition in sales to Ford and Chrysler, and that in order to obtain business in that market du Pont had "to match the competitive price." However, where du Pont was "not involved in competition we make a judgment as to what mark-up we think we can get, we put a mark-up on it and go to the purchasing agent with it." (Tr. 6192-6193).

Regarding du Pont's difficulty in obtaining business from Ford and Chrysler, Dr. Davis testified (Tr. 6193-6194):

> "Q Would you tell us in what respect there is intense competition in Ford and Chrysler?
>
> "MR. GRIBBON: I don't get that. Between Ford and Chrysler.
>
> "Q Du Pont with other suppliers for business of Ford and Chrysler.
>
> "A There are a number of competitors who are trying to sell them just as we are. They are vigorous competitors.
>
> "Q And your price is determined you say on the basis of what you can get competitively?
>
> "A Yes, in *that* market. That is one of the factors in determining it, Mr. Brady." (Emphasis added).

[80] A70, 279 F. Supp. at 377.

[81] A77-78, 279 F. Supp. at 380.

average mark-up over *mill cost* of 26.7% on sales of topcoats to other automotive manufacturers.[82]

Du Pont's officials testified that prices were based on a mark-up over *full replacement cost* including "mill cost indirect for administrative and overhead, as well as advertising, selling and other things" (Tr. 2398). The mark-up over *full replacement cost* on sales of topcoats to General Motors increased from 25%-30% in the early 1950's to 35% in later years while at the same time the mark-up over *full replacement cost* on sales to other automotive manufacturers remained about 18%. There, "*[t]he competitive position would not allow that kind of price.*" (Tr. 2399-2400; emphasis added.)

The numerical data plotted on PX 370 showing the mark-up over *mill cost,* and the mark-up over *full replacement cost* as described by du Pont's officials, are set forth in the table below. This table shows that du Pont charged higher mark-ups over both *mill cost* and *full replacement cost* on topcoats sold to General Motors than on topcoats sold to other automotive manufacturers.[83]

[82] These comparative mark-up data are referred to in the record (Tr. 1623-1628) and are plotted on graph PX 370. In the first appeal, du Pont's brief admitted (p. 19, note 14): "The percentages shown represent the margins by which selling price exceeded 'mill cost'."

[83] Topcoats sold to General Motors cost the same to produce as topcoats sold to others and were made on the same machinery.

	"Lacquer" Topcoat Sales to General Motors		"Enamel" Topcoat Sales to Others	
	Mark-up Over Mill Cost	Mark-up Over Replacement Cost	Mark-up Over Mill Cost	Mark-up Over Replacement Cost
1949 ...	57.2%	25-30%	25.2%	18%
1950 ...	63.3	25-30	30.4	18
1951 ...	45.0	25-30	19.1	18
1952 ...	48.6	25-30	20.5	18
1953 ...	53.3	25-30	21.9	18
1954 ...	55.5	25-30	21.8	18
1955 ...	58.4	25-35	26.5	18
1956 ...	51.2	35	32.4	18
1957 ...	54.0	35	27.1	18
1958 ...	63.5	35	33.5	18
1959 ...	78.5	35	42.4	18
Eleven-Year Average...	56.8	30 plus	26.7	18

During the relevant period du Pont's fabrics sales to General Motors doubled. Nevertheless it was unable to keep pace with or meet the increasing demands and the scheduled requirements of General Motors.

Max N. Nickowitz, Assistant Manager and Director of sales,[84] testified here that after 1947 and 1948 du Pont's "volume of business increased". (Tr. 6758). He explained that du Pont's dollar sales increased even though its percentage of General Motors fabrics requirements decreased (Tr. 6760):

> "A Yes. Actually the percentage decreased because they had to bring in—they had to bring in more producers because of increased consumption of coated fabrics.
>
> "Q Was that because of your inability to supply the increase?
>
> "A That's right."

[84] Mr. Nickowitz also testified in the government case. See 353 U. S. at 594 n. 12.

Mr. Mattlage said du Pont's product line and production facilities were "limited" and the Fabrics Division was "dependent" on the automotive industry for its "volume market" (Tr. 2042). The manufacturing equipment was "multi-purpose" and produced "upholstery and other types of coated fabrics for other industries." (Tr. 2081-2082).

As early as 1954 du Pont had production "problems" (Tr. 2093). In 1955 du Pont "had inadequate capacity to cope with the demand on some constructions rather vital to General Motors; so we were in trouble" (Tr. 2081). The problems arising from the ancient fabrics plant at Newburgh were such that Mr. Mattlage had to discuss the "seriousness of that situation at Newburgh on several occasions" (Tr. 2085).

After Mr. Mattlage testified that du Pont was unable to meet demands in 1955, he was then asked whether du Pont had "problems or difficulties again at a later date". His answer was: "Oh, yes" (Tr. 2093).

Du Pont's serious production problems persisted even after it "increase[d] the capacity by installing additional equipment" (Tr. 2082). As late as 1960 du Pont reported its failure to meet scheduled requirements of General Motors as follows: "70 items overdue totalling 97,486 yards" and "poor shipping service" (Tr. 2096).[85]

However, notwithstanding du Pont's production problems, lack of capacity and inability to meet shipping schedules, du Pont's mark-up for profit over *mill cost* on fabric sales to General Motors averaged 25.8% for the period

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[85] "[T]he strong inference against the plaintiffs' position", twice drawn by the District Judge (A19, 310 F. Supp. at 1260; A81-83, 279 F. Supp. 381, 382-383), obviously overlooks or disregards the undisputed facts reflected by du Pont's contemporaneous records and the testimony of its own officials which show that du Pont was unable to supply General Motors' requirements for automotive fabrics.

1954 through 1959 in contrast with a mark-up for profit of only 14.1% over *mill cost* on sales to other automotive manufacturers.[86]

The data show that du Pont charged General Motors a mark-up over *mill cost* of 23.0% in both 1957 and 1958 whereas the already low mark-up over *mill cost* on sales to others of 9.4% in 1957 was cut by more than half, to 4.3% in 1958. In 1956 du Pont charged a mark-up of 20.5% over *mill cost* on sales to General Motors, more than eight times the mark-up over *mill cost* of 2.5% on sales to others.

Although unable to "supply the increase" (Tr. 6760) du Pont in 1959 referred to the fact that other fabric manufacturers were selling some fabrics to General Motors at "lower than our [du Pont's] estimated costs" (Tr. 2090). Yet, in that same year du Pont charged General Motors a mark-up over *mill cost* of 29.6% in contrast with a mark-up over *mill cost* of 17.5% on sales to other automotive manufacturers.

Thinners, "used to apply" topcoats,[87] presented the same pattern, showing high mark-ups over *mill cost* on sales to General Motors while in four of eleven years the mark-up over *mill cost* on sales to others was less than 10%. In 1959, the mark-up over *mill cost* on sales to others was only 4.8% whereas in that year the mark-up over *mill cost* on sales to General Motors was 37.4% (Tr. 1620-1621, PX 368).

Thinners, mixed from ingredients purchased from others and packaged by du Pont for the automotive industry (Tr. 6189), returned an 11-year average mark-up over *mill cost* on sales to General Motors of 39.1% in contrast with an 11-year average mark-up of 22.6% on sales to others. The

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[86] Plotted on graph PX 565A; Tr. 3795, 3755-3764.

[87] 353 U. S. at 596.

price trend of thinners sold to General Motors rose from an index of 100.0% in 1949 to 117.9% in 1959 while at the same time thinners sold to others decreased from a 1949 index of 100.0% to a 1959 index of 95.4% (Tr. 1618-1620; PX 367).

So-called "undercoats" disclose the same pattern, rising in 1959 to a mark-up over *mill cost* of 47.2% on sales to General Motors, exceeding by more than half the 31.3% mark-up over *mill cost* on sales to others (Tr. 1621-1623; PX 369). Moreover, the price trend of undercoats sold to General Motors rose from a 1949 price index of 100.0% to a 1959 price index of 147.4% while in the same period the price index of undercoats sold to others rose from 100.0% to 113.3% (PX 366).

The testimony of du Pont's officials explained and confirmed what du Pont's contemporaneous records showed —high mark-ups on sales to General Motors in sharp contrast with low mark-ups on sales to others (Tr. 2197-2200; 2382; 2386; 2388; 2398-2400; 6171-6173; 6192-6194).

Just as the District Court found a higher price to General Motors for topcoats of about a dollar a gallon,[88] and a wider "spread" between cost and sales price on fabrics,[89] so the *contemporaneous records* of du Pont show prices *increasing more rapidly* during the period on sales to General Motors than on sales to others.

For the years 1954 through 1959 the price trend of sales by du Pont to General Motors of vinyl upholstery shows an increase in price from an index of 100% to an index of 124.9%. During the same period there was a decrease in the prices paid by Chrysler and Ford from 100 to 98.0%

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[88] A70, 279 F. Supp. at 377.

[89] A81, 279 F. Supp. at 381-382.

and 79.9%, respectively, as plotted in graph form (PX 362) reflecting the data submitted by du Pont (PX 336):

	Sales to General Motors	*Sales to Chrysler*	*Sales to Ford*
1954	100.0	100.0	100.0
1955	100.3	95.8	85.1
1956	105.6	83.2	63.8
1957	118.7	103.3	78.7
1958	123.3	93.6	79.2
1959	124.9	98.0	79.9

As set forth in PX 366, the average annual price on sales of undercoats to General Motors, using 1949 as index of 100, rose to 147.4% in 1959, whereas the same index on sales to others of undercoats rose to 113.3% in the same period. The following table shows the average annual price on sales of undercoats:

	Sales to General Motors	*Sales To Others*
1949	100.0	100.0
1950	96.2	96.9
1951	103.2	104.0
1952	108.4	112.6
1953	121.7	112.0
1954	120.9	110.3
1955	121.3	109.5
1956	123.2	113.7
1957	134.7	114.7
1958	133.7	116.1
1959	147.4	113.3

As set forth in PX 367, the average annual price on sales of thinners to General Motors, using 1949 as index of 100, rose to 117.9% in 1959, whereas the same index on sales of thinners to others declined from 100 to 95.4%

in the same period. The following table shows the average annual price on sales of thinners:

	Sales to General Motors	*Sales To Others*
1949	100.0	100.0
1950	94.9	99.1
1951	110.9	108.7
1952	114.5	111.0
1953	110.5	87.5
1954	109.2	87.5
1955	105.7	90.5
1956	106.3	104.2
1957	109.0	104.3
1958	112.3	99.5
1959	117.9	95.4

(3) "Surveillance" and "Lines of Communication" Prevented Any Competitor of du Pont from "Serious Contention" for General Motors' Business.

Du Pont set up "lines of communication" and maintained a "surveillance" which this Court found "made an impressive impact upon purchasing officials." [90]

Walter E. Mitchell, Director of the Paint Standard Activity Manufacturing Staff of General Motors, testified that du Pont representatives were *always present* at the yearly meetings (Tr. 3281-3283) which General Motors held to select all colors and paints for the entire model year (Tr. 3277-3299). Mr. Mitchell readily identified du Pont and General Motors officials present at these private meetings (Tr. 3277, 3283-3292; PX 486, 497, 498), including Henry Lauve, du Pont's expert who did not know whether his Citroen was painted with lacquer or enamel.[91]

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[90] 353 U. S. at 603.

[91] See *supra*, p. 9 n. 35.

Neither du Pont nor General Motors even attempted to produce any evidence to show that any purported competitor of du Pont was *ever present* at any of the yearly color selection meetings where the colors for the entire model years were selected.

General Motors conceded that for a period of time du Pont was the only paint manufacturer to submit colors for selection at these meetings which were attended only by du Pont and General Motors representatives (Tr. 3299).

Paint selections, exclusively from du Pont's offerings, reflected du Pont's "preemptive position" (Tr. 2386) in contrast with the position of "competitors who were never afterwards in serious contention."[92]

Topcoats thus selected were priced by lists (PX 393, 394, 395) showing "letter suffixes" for du Pont's cost brackets and the profit margins to be obtained on such sales. Those book prices to General Motors resulted in the eleven year average profit margin over *mill cost* of 56.8%.

Du Pont was required to submit competitive bids for sales of topcoats to other automotive manufacturers. However, du Pont destroyed all such bids before 1963, during the pendency of the government suit and the pendency of this suit. (Tr. 2284-2286, 2299-2313). These competitive bids produced an 11-year margin over *mill cost* of 26.7%.

Du Pont's higher prices and higher profit margins in the insulated General Motors' market took place while designees and deputies of du Pont's Finance Committee served on the Board of Directors of General Motors (Tr. 2462-2463). These designations were recognized by du Pont as "the official action" of du Pont[93] (Tr. 2644).

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[92] 353 U. S. at 603.

[93] See Judge Waterman's opinion that such official corporate action deputizing a member of another board renders the designating corporation itself "a director", *Feder* v. *Martin Marietta Corporation* (2 Cir. 1969), 406 F. 2d 260, cert. den. 396 U. S. 1036, applying *Blau* v. *Lehman*, 368 U. S. 403.

Lammot du Pont Copeland, President and Chairman of the Executive Committee of du Pont and a member of the Finance and Bonus and Salary Committees of the General Motors' Board testified that du Pont did not have any "fiduciary obligation towards General Motors" (Tr. 2643), but he, personally, had "nearly a fiduciary obligation" (Tr. 2562, 2642). Mr. Copeland had earlier in 1946 written his uncle Lammot du Pont that his serving on the Board of General Motors "was much more questionable from the ethical angle than my serving on U. S. Rubber which is not a customer of importance to du Pont" (PX. 427, Tr. 2562-2567).

Alfred P. Sloan, Jr., Chairman of General Motors wrote du Pont in 1943 that General Motors was "careful to exclude those who represent interests that have relationship with General Motors, particularly in the buying and selling area . . ."; however, this did not apply to "representatives of du Pont . . . because I believe you should determine what representation you want on the General Motors Board." (PX 86; Tr. 329, 330.)

In 1948 when Mr. Sloan asked for a "ruling" whether some *other* "supplier to the extent of 20% of General Motors' needs" (PX 462) might be eligible for the General Motors Board, Lammot du Pont noted that, depending upon the dollars involved, "20% of General Motors' buying requirements might be large enough" to "support charges of 'conspiracy', or evil doing" (PX 463).

After 1949, at least four out of the five (later six) members of the General Motors Bonus and Salary Committee were du Pont deputies on the General Motors' Board (PX 8, 9). When asked why there were so many du Pont representatives on that Committee, Mr. Sloan testified in 1953 in the government case: "I don't know any reason for that. It just happened that way." (Tr. 8869-8870).

But even as early as 1942 Lammot du Pont, then Chairman of the Board of du Pont, noted the importance of ap-

pearing to reduce " 'du Pont influence' in General Motors' operations" as "bowing to the trend of the times", but "*in this case the situation is such* that no great harm will be done by 'bowing' ". (PX 84; Tr. 313-318; emphasis added).

Thus, long-standing habits, historic ties and relationships, combined with its 23% stock interest, served to maintain and preserve du Pont's hold on General Motors.

Reasons for Granting the Writ

I.

The courts below have proceeded from such an erroneous concept of legal standards as to undermine all private enforcement of the antitrust laws, especially in cases involving the vertical application of power.

The decisions below stand for the proposition that use of stock control to insulate a market, once it becomes successful, thereby becomes impervious to attack. Once du Pont succeeded in insulating from competition most of the General Motors market for finishes and fabrics, du Pont then created the market structure. In this market structure, as this Court found in 1957, those who had been competitors of du Pont "were never afterwards in serious contention."[94]

Failure of any purported competitors of du Pont to get back into "serious contention" is shown by the increasing percentage of du Pont's production of finishes and fabrics which General Motors absorbed, and the actual increase to an average of 74% of General Motors' finishes requirements.

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[94] 353 U. S. at 603.

Faced with these undisputed basic facts, du Pont finally was compelled to admit below that purported competitors of du Pont may have been injured, since they were insulated and fenced "out" of the General Motors market. Of course, applicable statutes of limitations have obviously run against any such "competitors". However, apparently neither du Pont, nor the Courts below, could conceive that General Motors was injured when it was insulated or fenced "in".

When General Motors was insulated, or literally made an island of, it was deprived of "easy access to suppliers by buyers."[95] General Motors was the target itself; it was aimed at and was hit. Its stock was the subject of acquisition; its market was the object of penetration; and it was penetrated and insulated.

This Court in *Brown Shoe* pointed out that power to control resulting from the acquisition of stock is not merely analogous to a "tying" arrangement, but is a "more permanent and irreversible tie than is contract integration."[96] That is precisely applicable to this case, because this Court held that it was "intercorporate combination and control" which was the "heart" of the "violation proved."[97]

It was this "more permanent and irreversible tie" which was wholly ignored below. While it was held that petitioners "conclusively proved" four facts, even without the benefit of the *prima facie* evidence of the government's suit, the fifth and crucial fact, according to Judge Metzner, was that petitioners failed to prove "that du Pont used its stock interest to entrench itself. . . ."[98]

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[95] *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 322.

[96] 370 U. S. at 322, n. 55.

[97] 366 U. S. at 320, 323, 329.

[98] A18, 310 F. Supp. at 1259.

It is obvious, therefore, since this Court found precisely the opposite, that on the face of the opinions below there is a flat contradiction of this Court which cannot be permitted to stand.[99] This Court has never permitted a lower court to obliterate and nullify its judgments as did Judge Metzner, who stated at the final conference on remand on March 13, 1970 (Tr. 41):

> "That happens to be the great problem in this case, both in the Supreme Court and the Court of Appeals, the internal inconsistencies of the language."

However, the economists both for petitioners and du Pont found no such problem.[100] Both of them recognized and agreed that if du Pont exercised influence or control over General Motors' buying policies, then the higher prices, higher mark-ups and larger profit margins charged by du Pont to General Motors reflected illegal overcharges in a non-competitive insulated market.

By ignoring and rejecting the determination of this Court in the government case, as well as its more recent admonition that "[t]rial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion of a market . . ."[101] the Courts below have permitted du Pont "to profit by [its] wrongdoing . . . at the expense of [its] victim [so that] the more grievous the wrong done, the less likelihood there would be of recovery."[102]

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[99] See *Utah Public Service Commission* v. *El Paso Natural Gas Co.*, 395 U. S. 464, 467; see also, *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 136; *Leh* v. *General Petroleum Corp.*, 382 U. S. 54, 59.

[100] Tr. 7985, 8066, 8076, 9693. See *supra*, p. 4 n. 7.

[101] *Zenith, supra*, 395 U. S. at 123.

[102] Bigelow, *supra*, 327 U. S. at 264-265.

II.

The decisions below conflict with the decisions of this Court; they emasculate the antitrust laws by engrafting a rigid, mechanical and impossible formula as the exclusive method of proving the *fact* of damage.

The Courts below embraced what this Court has prohibited; and at the same time rejected what this Court has held to be proof of *fact* of damage.

Indeed, the Courts below adopted as the exclusive formula for proof of *fact* of damage the very recipe outlawed in *Continental Ore*[103], that petitioners "exhaust all other sources of supply", which "rigid or mechanical formula" to determine antitrust liability compelled reversal in that case.

The Courts below held that the only way to show *fact* of damage was to show that other sources of supply "could have supplied finishes . . . at a price lower than that paid by General Motors to du Pont"[104], disregarding entirely that this Court utilized relevant market data as late as 1955[105] in finding that other sources of supply or purported competitors of du Pont *"were never afterwards in serious contention."*[106] (Emphasis added)

It would be futile, and indeed impossible, to prove injury through those who were not "serious" contenders, even if that obstacle had not been prohibited by *Continental Ore, supra.*

Having settled upon this "rigid or mechanical formula," the Courts below closed their eyes to the competi-

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[103] *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 698-699.

[104] A16, 310 F.Supp. at 1259; A76, 279 F.Supp. at 379; A10, 436 F.2d 1211.

[105] 353 U. S. at 595, n. 16.

[106] 353 U. S. at 603.

tive market of sales to Ford and Chrysler and its sharp contrast with the insulated General Motors market.

The Courts below disregarded du Pont's contemporaneous records which particularized specific damage that flowed from du Pont's power to insulate the General Motors market, the "heart" of du Pont's antitrust violation.

These contemporaneous records showed not only du Pont's entrenched share of the insulated market, but also what du Pont *did* with its share in contrast with what du Pont could not do in competition with other suppliers to Ford and Chrysler.

The summary of such data (*supra,* pp. 18-28), shows that price competition in sales to Ford, Chrysler and others limited du Pont's prices and profit margins to the levels imposed by such price competition. Prices and profits on sales to General Motors exceeded those levels; hence General Motors was overcharged and injured.

These undisputed basic facts from contemporaneous records show the insulated General Motors market side by side with the competitive market. Side by side is a customer controlled by a stock interest with customers not so controlled. Side by side is an entrenched market share of the business of the controlled customer in contrast with sharp up and down swings in the market shares of the business of uncontrolled customers (*supra,* pp. 17-18). Side by side is a rigid price system for the controlled customer contrasted with a practice of quotations and competitive bids for sales to the uncontrolled customers (*supra,* pp. 27-28). Side by side is a higher mark-up on the entire range of products sold to the controlled customer contrasted with lower mark-ups on the entire range of products sold to uncontrolled customers. Side by side are more rapidly increasing price trends on sales to the controlled customer contrasted with slower price increases, and even *decreasing* price trends, on sales to uncontrolled customers. Side by side are high resulting profits consist-

ently and increasingly achieved on sales to the controlled customer in contrast with far lower and highly erratic profits on sales to uncontrolled customers.

Here, as in *Hanover Shoe, supra,* petitioners have proven an "overcharge". Du Pont obtained its market power over General Motors through stock control just as United Shoe obtained its market power through the leasing system. In both cases "the result to be achieved that the statute condemns"[107] was what this Court quoted in *Hanover Shoe* as " 'the magnetic ties inherent' ", " 'partnership aspects' " and " 'closer and more frequent contacts' "—all of which enabled du Pont to maintain a "pricing system which discriminate[d]"[108] against General Motors on finishes and fabrics purchased from du Pont.

Hypothetical selling prices for hypothetical sales were sufficient to determine both the *fact* of damage and the *quantum* of damage in *Hanover Shoe.* An "estimated percentage of the foreign market" was sufficient to demonstrate both "the fact and extent of its business injury" in *Zenith* I and II.[109]

The Courts below have disregarded this Court's decisions in failing to adjudge even the *fact* of damage, although du Pont's "overcharge" in the insulated General Motors market is starkly juxtaposed side by side with the lower prices and profits du Pont was able to obtain in a competitive market on sales to other automotive manufac-

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[107] *American Tobacco Co.* v. *United States,* 328 U. S. 781, at 809.

[108] *Hanover Shoe, supra,* 392 U. S. at 486 n. 3, citing *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, 340 in which Judge Wyzanski noted ". . . United's policy of fixing a higher rate of return where competition is of minor significance and a lower rate of return where competition is of major significance."

[109] *Zenith* II, *supra,* Slip Op. 1, —— U. S. ——.

turers. Indeed, petitioners here have shown, beyond the requirements of this Court, "concrete, detailed proof of injury", [110] to prove the *fact* of damage.

Conclusion

WHEREFORE, petitioners ask that a writ of certiorari issue to review the Judgment of the Court below and that on such review the Judgment be reversed.

Respectfully submitted,

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Dated: April 22, 1971.

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[110] *Zenith, supra,* 395 U. S. at 123.

Appendix A

436 F.2d 1205

Callman GOTTESMAN, Maria Mattiello and Paul J. Peyser, Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION and E. I. du Pont de Nemours & Company, Defendants-Appellees.

No. 150, Docket 34982.

United States Court of Appeals, Second Circuit.
Argued Nov. 9, 1970.
Decided Jan. 4, 1971.
Rehearing Denied Feb. 1, 1971.

[1206] David Brady, New York City, Bergreen & Bergreen, Gordon, Brady, Caffrey & Keller, Netter, Netter, Dowd, Fox & Ness, Leo Brady, Clendon H. Lee and Arthur B. Netter, New York City, of counsel for plaintiffs-appellants.

Daniel M. Gribbon, Washington, D. C., Covington & Burling, Littauer, Gordon, Ullman, Riseman & Ploscowe, Hugh B. Cox, Harris Weinstein, Richard B. Stewart, Frank H. Gordon, Washington, D. C., and Irving S. Shapiro, Wilmington, Del., of counsel, for defendant-appellee E. I. du Pont de Nemours & Co.

Edward B. Wallace, New York City, Ross L. Malone, William A. Grier and John J. Higgins, New York City, of **[1207]** counsel for defendant-appellee General Motors Corp.

Before MARIS* and MOORE, Circuit Judges, and RYAN,** District Judge.

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* Of the Third Circuit, sitting by designation.

** Of the Southern District of New York, sitting by designation.

MARIS, Circuit Judge:

This is a derivative action brought under section 4 of the Clayton Act[1] by the plaintiffs as stockholders of General Motors Corporation against E. I. du Pont de Nemours and Company for treble the damages sustained by General Motors by reason of du Pont's violation of section 7 of the Clayton Act and sections 1 and 2 of the Sherman Act and the breach of its common law fiduciary duty. The action was commenced shortly after the decision of the Supreme Court in the suit of the United States v. E. I. du Pont de Nemours and Company was handed down in 1957 holding that du Pont's commanding position as a supplier of automotive fabrics and finishes to General Motors, obtained at least in part by its ownership of a 23% stock interest in General Motors, violated section 7 of the Clayton Act.[2] The Government's action was brought in 1949,[3] while

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[1] "§ *15. Suits by persons injured; amount of recovery*

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." [15 U.S. C.A. § 15.]

[2] United States v. E. I du Pont de Nemours and Company, 1957, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057.

[3] The Government's action was held to be governed by the Clayton Act's provisions before the 1950 amendments. In 1949 section 7, in pertinent part, provided:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." [15 U.S.C. (1946 Ed.) § 18.]

the present private derivative action relates to the period 1950 to 1959. The plaintiffs in the present suit relied, under section 5(a) of the Clayton Act,[4] upon the matters adjudicated in the Government's action and they also offered a great deal of additional evidence seeking to establish injury.

A trial was had to a judge without a jury, limited to the question of injury or the fact of damage, as distinguished from the amount of the damages. The trial judge, having previously ruled that the Government's judgment was not available to the plaintiffs under section 5(a) of the Clayton Act because it dealt with a time prior to that covered by this private suit and that a violation of section 7 of the Clayton Act did not give rise to a private action for treble damages,[5] held that the plaintiffs had not proved their Sherman Act and fiduciary [1208] claims and dismissed the first and ninth causes of action insofar as they pertained to automotive fabrics and finishes.[6] On appeal by the plaintiffs this court set aside the judgment, holding that a violation of section 7 of the Clayton Act may be the basis

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[4] "a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A." [69 Stat. 283; 15 U.S.C.A. § 16(a).]

[5] Gottesman v. General Motors Corporation, D.C.N.Y.1963, 221 F.Supp. 488, leave to appeal denied (2 Cir. Jan. 31, 1964), cert. den. 379 U.S. 882, 85 S.Ct. 144, 13 L.Ed.2d 88 (1964).

[6] Gottesman v. General Motors Corporation, D.C.N.Y.1967, 279 F.Supp. 361.

for a private suit for damages and that the trial judge had not given sufficient evidentiary weight to the matters involved in the Government's prior judgment which the plaintiffs were entitled to have treated as prima facie evidence in their case.[7]

On remand the parties agreed that the claims for relief, including money damages for violation of section 7, could be determined on the existing record and that the issue should remain limited to the question of injury or the fact of damage. Upon reconsideration the trial judge held that the facts established prima facie by the Government's prior judgment were, first, that du Pont used its stock interest to entrench itself as the primary supplier of automotive fabrics and finishes to General Motors, and, second, that the stock interest led to the insulation from free competition of most of General Motors' market in these products. After affording evidentiary weight to the facts thus established prima facie, the trial judge held that they in themselves did not support a finding of actual injury or damage to General Motors on the section 7 claim or require a different result from that previously reached on the Sherman Act and fiduciary claims. Pointing out that no showing had been made that General Motors could have purchased the materials in question on the open market at lower prices with equal service and quality the trial judge concluded that the plaintiffs had failed to prove injury to General Motors and judgment was again entered dismissing the first and ninth causes of action.[8] The present appeal, the second by the plaintiffs, followed.

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[7] Gottesman v. General Motors Corporation, 2 Cir. 1969, 414 F.2d 956. In view of the disposition of that appeal, this court specifically pointed out that it was unnecessary to express any views on the merits of plaintiffs' other arguments in regard to their Sherman Act and breach of fiduciary claims. See 414 F.2d at 965.

[8] Gottesman v. General Motors Corporation, D.C.N.Y.1970, 310 F.Supp. 1257.

The facts disclosed in the Government's case have been fully set out in the opinions of the District Court for the Northern District of Illinois[9] and the Supreme Court[10] in that case and the additional facts developed in the present case are sufficiently recited in the opinions of the district court[11] in this case. They, therefore, need not be repeated here.

[1] The plaintiffs' contentions on this appeal, upon analysis, resolve themselves basically into two. The first is that the Supreme Court in the Government's case found that General Motors had been injured by du Pont's violation of section 7 of the Clayton Act and that the trial judge in the present case failed to give appropriate[12] effect to that find **[1209]** ing. The second is that, in any event, the plaintiff's additional evidence established the fact of injury and that the trial judge was guilty of clear error in finding that, while du Pont's ownership of stock in General Motors constituted a violation of section 7 of the Clayton Act, the violation did not cause any injury to General Motors. We find no merit in either contention of the plaintiffs.

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[9] United States v. E. I. du Pont de Nemours and Company, D.C.Ill.1954, 126 F.Supp. 235, on remand, 1959, 177 F.Supp. 1.

[10] United States v. E. I. du pont de Nemours and Company, 1957, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057, and United States v. E. I. du Pont de Nemours and Company, 1961, 366 U.S. 316, 81 S.Ct. 1243, 6 L.Ed.2d 318.

[11] Gottesman v. General Motors Corporation, D.C.N.Y.1963, 221 F.Supp. 488; 1967, 279 F.Supp. 361; 1970, 310 F.Supp. 1257.

[12] The plaintiffs are somewhat ambivalent in their argument as to whether the effect should be conclusive, almost conclusive or prima facie only. The authorities, however, are clear that the effect is to be prima facie only. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 1968, 392 U.S. 481, 484, 489, 88 S.Ct. 2224, 20 L.Ed.2d 1231; Emich Motors Corp. v. General Motors Corp., 1951, 340 U.S. 558, 568, 569, 570-571, 71 S.Ct. 408, 95 L.Ed. 534; Herman Schwabe, Inc. v. United Shoe Machinery Corp., 2 Cir. 1962, 297 F.2d 906, cert. den. 369 U.S. 865, 82 S.Ct. 1031, 8 L.Ed.2d 85.

In support of the first contention the plaintiffs argue that the undisputed facts in the Government's case established not only violation of section 7 of the Clayton Act but also injury to General Motors by reason of such violation and that the trial judge did not give realistic recognition to the latter finding. In support of their contention that the Supreme Court found such injury they point to certain passages from the 1957 and 1961 opinions of that Court which, they urge, constitute such a finding. We have studied these opinions with the greatest care and we cannot agree with the plaintiffs' contention in this regard. The question of injury to General Motors was not raised by the Government in its pleadings, was not involved in the charge of violation of section 7 of the Clayton Act and was, accordingly, neither considered nor resolved by the Court in the Government's case. The statements to which the plaintiffs refer were directed to the Court's determination of the section 7 violation. We think that the Court made it clear that it was not dealing with actual injury when it said that "considerations of price, quality and service were not overlooked" by the officers of both companies and that they acted "honorably and fairly."[13]

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[13] "We agree with the trial court that considerations of price, quality and service were not overlooked by either du Pont or General Motors. Pride in its products and its high financial stake in General Motors' success would naturally lead du Pont to try to supply the best. But the wisdom of this business judgment cannot obscure the fact, plainly revealed by the record, that du Pont purposely employed its stock to pry open the General Motors market to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics.

"Similarly, the fact that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors, does not defeat the Government's right to relief. It

(*footnote continued on following page*)

In its opinion on the first appeal in this case this court did say, as the plaintiffs point out, that the Supreme Court in its second opinion "apparently regarded its 1957 holding as encompassing not only an antitrust violation but also injury."[14] But we were there referring [1210] to the injury to the public interest[15] which resulted from du Pont's violation of section 7 of the Clayton Act, not to private injury to General Motors. Private injury does not necessarily accompany such a public injury. Indeed, it is possible that such a public injury might result from an antitrust violation by a seller while at the same time the

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(*footnote continued from previous page*)

is not requisite to the proof of a violation of § 7 to show that restraint or monopoly was intended." [353 U.S. 586, 606-607, 77 S.Ct. 872, 884.]

Upon remand, the District Court for the District of Northern Illinois made the following observation:

> "In its opinion the Supreme Court recognized the fact that all concerned in high executive posts in both du Pont and General Motors 'acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors.' 353 U.S. 586, 77 S.Ct. 872, 884, 1 L.Ed.2d 1057. The Supreme Court thus accepted the detailed findings of this Court to the effect that in the commercial relations between du Pont and General Motors there was no fraudulent or improper conduct on the part of the officers and directors of both companies, and no overreaching of any kind. Here again, however, the Court concludes that these facts do not in any way mitigate or qualify the duty of this Court to frame a decree that will effectively remove and guard against the effects of the acquisition of the stock which have been held to be offensive to the statute." [177 F.Supp. 1, 14.]

Upon the second appeal by the Government to the Supreme Court, this observation by the trial judge was not rejected as an incorrect interpretation of its first opinion.

[14] Gottesman v. General Motors Corporation, 1969, 414 F.2d 956, 964.

[15] See Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 311-324, 82 S.Ct. 1502, 8 L.Ed.2d 510.

buyer was financially benefited.[16] This court sought to make it clear that it did not regard the decision in the Government's case as controlling on the issue of injury to General Motors when it went on to say:

> "In any event, as to all the issues, the trier of fact must make the determination, giving proper weight to the earlier judgment."[17]

[2] Moreover, the Government's judgment did not, as the plaintiffs argue, shift to du Pont the burden of proving that General Motors was not damaged by its violation of section 7 of the Clayton Act. As this court in its opinion on the first appeal stated:

> "Of course, plaintiffs cannot rest on a showing of a violation of section 7; they must, as in private actions under other sections of the antitrust laws, prove that they have been injured by the violation."[18]

And also that:

> "we are aware that the judgment is only prima facie evidence at best and that plaintiffs have the burden of showing not only antitrust law violation but injury as well."[19]

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[16] In fact, it appears that in the Government's case against du Pont involving the antitrust violation upon which the plaintiffs here rely the Government's original complaint averred that du Pont favored General Motors over the latter's competitors. United States v. E. I. du Pont de Nemours and Company, D.C.Ill.1959, 177 F.Supp. 1, 49.

[17] 414 F.2d at 965.

[18] 414 F.2d at 961.

[19] 414 F.2d at 965.

We are satisfied that the trial judge did not err in holding that the judgment of the Supreme Court in the Government's case, given its full evidentiary value, was not evidence, conclusive or prima facie, of the fact of damage by du Pont to General Motors.

[3] When, as in this case, the question of private injury resulting from an antitrust violation has not been litigated in the Government's case, the burden is on the plaintiff, in its treble damage suit under section 4 of the Clayton Act, to support its claim of resulting damage by the introduction of evidence.[20] This the plaintiffs sought to do in the present case. They relied on evidence of the volume of purchases of automotive fabrics and finishes by General Motors from du Pont and du Pont's markups on the various materials which, they urge, particularize and spell out special damage to General Motors. They argue that du Pont's "entrenched market share" acquired as the result of its stock ownership in General Motors enabled it to extract higher prices from General Motors by means of markups and margins for profits on these products than on the same or comparable products sold to other automotive manufacturers.

[4] The trial judge, on remand, fully considered the issue of fact thus raised. He reviewed the record, giving the judgment in the Government's case the prima facie effect to which it was entitled with respect to du Pont's violation of section 7 of the Clayton Act, and he reconsidered the findings which he had previously made. His conclusion was that his previous findings were correct and he

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[20] Herman Schwabe, Inc. v. United Shoe Machinery Corp., 2 Cir. 1962, 297 F.2d 906, 909-910, cert. den. 369 U.S. 865, 82 S.Ct. 1031, 8 L.Ed.2d 85.

reaffirmed them.[21] In his previous opin [1211] ion[22] the trial judge had fully considered the evidence as to the different automotive finishes (topcoats, undercoats and thinners) manufactured by du Pont under various trade names and the relative qualities of these products, including the difference in cost to General Motors of enamel and lacquer, a point upon which the plaintiffs lay great emphasis. He concluded that

> "From all of the evidence, it was General Motors' considered business judgment, well substantiated by the record here, that lacquer was superior to enamel as a topcoat for passenger cars. This business judgment was not affected either directly or indirectly by du Pont's stock ownership in General Motors.
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> * * *
>
> "No evidence was adduced that any competitive source was foreclosed from obtaining finish business from General Motors or that any competitior could have supplied finishes of the same quality and description, and with comparable service, at a price lower than that paid by General Motors to du Pont. There is no eivdence that du Pont, directly or indirectly, influenced the decisions made in any of the steps involved in the purchases of finishes."[23]

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[21] These findings had been made with respect to the injury alleged to be suffered as a result of Sherman Act and fiduciary violations. The trial judge, however, expressly held in his opinion upon remand that they were equally apposite to the plaintiffs' claims under section 7 of the Clayton Act. 310 F.Supp. at 1260. On the present appeal the plaintiffs have taken the position that in view of du Pont's established and admitted violation of section 7 of the Clayton Act it is no longer necessary on the issue of liability to consider the alleged Sherman Act violations.

[22] 279 F.Supp. at 375-381.

[23] 279 F.Supp. at 378, 379.

The trial judge had also given thorough consideration to plaintiffs' emphasis on the volume of General Motors' purchases of finishes from du Pont, finding that each purchasing division of General Motors acted independently of the other for its own best interest, and stating that "The fact is that merchandise of the same quality and description in a product line was sold by du Pont at the same price to all its customers."[24]

In his previous opinion the trial judge had fully considered the plaintiffs' contentions with regard to du Pont's sale of fabrics to General Motors and the difference in the spread between mill cost and sale prices as compared to the total sales to other automotive manufacturers. He stated that du Pont's differing prices depended on variations in color, finish, range of grade and specification of decorative effects by the purchaser, finding that

> "* * * Plaintiffs have not shown comparable purchases of fabrics of like color, finish and grade by other automobile manufacturers, and therefore the difference in spread cannot support a finding sustaining plaintiffs' contention."[25]

And with regard to the sales made to the Fisher Body Division of General Motors, the trial judge found that

> "* * * The purchasing agents of Fisher then negotiated competitive prices before making allocations. They exercised unfettered discretion in buying the product best suited for their purposes from the standpoint of price, quality and styling appeal. The purchases were based solely on competitive merit."[26]

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[24] 279 F.Supp. at 380.

[25] 279 F.Supp. at 381-382.

[26] 279 F.Supp. at 383.

All these findings by the trial judge are supported by substantial evidence and we cannot say that they are erroneous, let alone clearly so. We, therefore, may not set them aside. Rule 52(a), F.R.Civ.P.

[5] The plaintiffs' final argument is that the trial judge erred in rejecting their contention that du Pont's antitrust violation breached a fiduciary obligation it had to General Motors. The trial judge, in his first opinion, discussed the plaintiffs' fiduciary claims, in the light [1212] of decisions on the subject of common law fiduciary duty, and concluded that even if there was a fiduciary duty it was not breached by du Pont in relation to the purchase of fabrics and finishes.[27] The cases relied upon by the plaintiffs in support of their contention are wholly distinguishable on their facts from the present case. The trial judge found that du Pont had sustained the burden of demonstrating that its transactions with General Motors were scrupulously fair. The plaintiffs have not satisfied us that these findings of the trial judge are erroneous.

The judgment of the district court will be affirmed.

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[27] The trial judge made the following findings:

"To determine fairness, courts consider the market price of the goods sold if one is ascertainable, whether the corporation received full value in all the commodities purchased, the extent of dominance by the controlling corporation, who initiated the complained of transactions, and more generally whether reasonable and disinterested directors would have assented to the transactions.

"The business relationships growing out of the sale of automotive fabrics and finishes by du Pont to General Motors were completely unrelated to the stock interest that du Pont held in General Motors. These sales and purchases resulted from arm's length transactions under competitive conditions. The prices paid by General Motors were market place prices. The quality of the products and the service that was furnished with the products were equal to if not better than what was available in the market place." (279 F.Supp. at 385.)

310 F.Supp. 1257

Callman GOTTESMAN, Maria Mattiello and Paul J. Peyser, Plaintiffs,

v.

GENERAL MOTORS CORPORATION and E. I. du Pont de Nemours & Company, Defendants.

Civ. No. 121-251.

United States District Court, S. D. New York.

March 30, 1970.

[1257] David Brady, New York City, for plaintiffs, O'Connor & Farber, Gordon, Brady, Caffrey & Keller, Netter, Lewy, Dowd, Fox, Ness & Stream, Rogers, Hoge & Hills, Leo Brady, Clendon H. Lee, Arthur B. Netter, Richard Netter, Henry L. Bayles, Abbott Gould and Sidney P. Howell, Jr., New York City, of counsel.

Ross L. Malone, New York City, for defendant, General Motors Corp., Edward B. Wallace, William A. Grier, John J. Higgins and Philip H. Omsberg, New York City, of counsel.

Littauer, Gordon, Ullman, Riseman & Ploscowe, New York City, and Covington & Burling, Washington, D. C., for defendant, E. I. du Point de Nemours & Co., Frank H. Gordon, New York City, Daniel M. Gribbon and Harris Weinstein, Washington, D. C., and Irving S. Shapiro, Wilmington, Del., of counsel.

METZNER, District Judge.

This derivative action by minority stockholders of General Motors sought treble damages pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, alleging that du Pont had violated § 7 of the Clayton Act, 15 U.S.C. § 18, and §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, and had breached

its common law fiduciary duty to General Motors. The action was instituted immediately after the Supreme Court announced its decision in the government's enforcement action against these defendants. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957). The Court held that du Pont had obtained a commanding position as the supplier of automobile finishes and fabrics to General Motors through its own [1258] ership of 23% of the stock of General Motors and that this was a violation of § 7 of the Clayton Act.

In the instant case, this court held that a violation of § 7 did not give rise to a private right of action for money damages. At the same time it was held that the enforcement judgment was not available to the plaintiffs under § 5(a) of the Clayton Act, 15 U.S.C. § 16(a), because it dealt with a time period prior to that covered by this private suit. 221 F.Supp. 488 (S.D.N.Y.1963), *leave to appeal denied* (2d Cir. Jan. 31, 1964), *cert. denied,* 379 U.S. 882, 85 S.Ct. 144, 13 L.Ed.2d 88 (1964).

The trial on the merits of the Sherman Act claims and the fiduciary claim then proceeded, resulting in a judgment in favor of the defendants. 279 F.Supp. 361 (S.D.N.Y.1967). The plaintiffs, in appealing from this adverse judgment, raised the propriety of the court's previous ruling as to the applicability of § 7 and the effect to be given to the government judgment under § 5(a). The Court of Appeals remanded the case for further proceedings because it held that a private claim for money damages could be maintained on an alleged violation of § 7 and that the government judgment should have been given greater evidentiary weight. The court specifically stated that it did not pass upon the merits of the litigation. 414 F.2d 956 (2d Cir. 1969).

This court conferred with counsel who subsequently submitted briefs as to the proceedings to be had on the re-

mand. The parties agreed that the claims for relief, including money damages for violation of § 7, could be determined on the existing record,[1] giving due weight to the judgment in the government enforcement action as suggested by the Court of Appeals. Du Pont conceded that its stock interest in General Motors constituted a violation of § 7 during the damage period. In terms of § 7, as interpreted by the Supreme Court in the government action (353 U.S. at 607, 77 S.Ct. 872, 1 L.Ed.2d 1057[2]), this means that there was a reasonable probability that the stock ownership was likely to result in the creation of a monopoly at the time of suit.

The parties further agreed that the sole issue to be decided on the remand is whether this violation caused injury to General Motors. The Court of Appeals held:

> "Of course, plaintiffs cannot rest on a showing of a violation of section 7; they must, as in private actions under other sections of the antitrust laws, prove that they have been injured by the violation." 414 F.2d at 961.
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> "We are aware that the judgment is only prima facie evidence at best and that plaintiffs have the burden of showing not only antitrust law violation but injury as well." 414 F.2d at 965.

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[1] Du Pont did request permission to submit records as to General Motors' purchases of finishes and fabrics for the years 1960-1968, which request is denied.

[2] The Court of Appeals pointed out (414 F.2d at 959) that the Supreme Court posed the question in terms of whether there was "the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce", and that the Court did not determine whether there was an actual restraint of competition at that time.

When the Court of Appeals speaks of injury, it is speaking of the fact of injury as opposed to the amount of damages, since the original trial was limited solely to the question of liability. In Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571, 23 L.Ed.2d 129 (1969), the Court said:

> "Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; * * *"

[1259] Translating the Court's language in terms of this case, it calls for answers to two questions. First, did du Pont's stock ownership produce the sales to General Motors? Second, if so, could General Motors have bought the merchandise at lower prices with equal quality and services?

To answer these questions on the existing record, a determination must be made as to the evidentiary weight to be given the government judgment. The Court of Appeals, in referring to the cases which it relied on to justify the use of a judgment covering a different time period, stated in 414 F.2d at 963:

> "While it is true that in none of these latter cases was the earlier government judgment allowed into evidence * * * it is equally true that no flat, inflexible rule of exclusion was applied. The rationale which emerges from them is that while a judgment of violation in a government suit covering a given period is insufficient to establish a violation at a later date, that judgment may be of evidentiary weight in the private action if it encompasses findings sufficiently

> related to the issues of the private action and if sufficient additional evidence is adduced to show that the illegal activities condemned in the government decree carried over into the period in issue."

§ 5(a) provides that a final judgment in an enforcement action is "prima facie evidence against such defendant" in a private damage suit "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto".

I discussed the meaning of this language in 221 F.Supp. at 490. There is no need to review that material again. At that time I held that "only ultimate facts determined in the first suit are prima facie evidence of ultimate facts in the second suit." Id. at 491. I stated the following facts which the Court found necessary to the enforcement judgment:

> "that du Pont acquired 23 per cent of the stock of General Motors, which acquisition was not solely for investment; that automotive finishes and fabrics constitute a substantial 'relevant market' within the meaning of the Clayton Act; that General Motors' share of that market was substantial; that du Pont supplied a substantial share of that market; that du Pont used its stock interest to entrench itself as the primary supplier to General Motors of automotive fabrics and finishes." Id. at 491-492.

These facts, however, were not given prima facie effect because the damage period here was different from that in the government suit. In view of the Court of Appeals ruling, these facts are now considered as prima facie evidence in this suit. I should point out that even without such prima facie weight I found after trial that the first four facts were conclusively proved by the plaintiffs, stat-

ing as to the stock ownership that "du Pont, by reason of its 23% stock interest in General Motors, had the power to control that corporation because of the unrelated ownership of the balance of the shares." 279 F. Supp. at 368.

The Supreme Court's second opinion in the du Pont case dealt with the form of relief to be granted in the government action. It said that it had held in its first opinion that du Pont's stock acquisition in General Motors "had led to the insulation from free competition of most of the General Motors market in automobile finishes and fabrics." 366 U. S. 316, 318-319, 81 S. Ct. 1243, 1246, 6 L. Ed. 2d 318 (1961). The Court of Appeals interpreted this language to mean that the government judgment encompassed "not only an antitrust violation but also injury." 414 F. 2d at 964. Therefore, this court must give this fact prima facie weight on the question of injury.

There have thus been established under the appellate rulings two matters which shall be prima facie evidence against the defendants in this suit which were not so considered on the trial. First, du Pont used its stock interest to entrench itself as the primary supplier of automotive fabrics and finishes to Gen [1260] eral Motors. Second, the stock interest led to the insulation from free competition of most of the General Motors market in automobile fabrics and finishes.

I have reviewed the evidence adduced on the trial and carefully considered plaintiffs' arguments as to the conclusions I should now draw, affording them under § 5(a) the full evidentiary weight of the government judgment, as directed by the Court of Appeals. Admittedly, the facts established prima facie by the government judgment do not by themselves dictate a finding for the plaintiffs on their § 7 claim or a different result on the Sherman Act or fidu-

ciary claims. Additional evidence must be forthcoming to show the existence of these facts during the damage period in issue. 414 F. 2d at 963. Added to this is plaintiffs' burden on the whole case to prove that there were violations of law which caused damage to General Motors.

On this review, I have come to the conclusion that the resolution of the evidence detailed in my original opinion (279 F. Supp. 361) should not be changed as to the Sherman Act and fiduciary claims.

[1, 2] The findings of fact originally made are equally apposite to plaintiffs' claim under § 7. The plaintiffs have failed to prove by a preponderence of the evidence that the stock interest caused General Motors to purchase its automotive finishes and fabrics from du Pont. I must again advert to, among other factors, the strong inference against the plaintiffs' position in this regard by reference to the small percentage of General Motors' requirements for fabrics that was allocated to du Pont. Furthermore, plaintiffs have failed to prove injury to General Motors. They have not shown that General Motors could have purchased the materials from someone other than du Pont at lower prices with equal service and quality.

Plaintiffs place great reliance on the recent decision in Zenith Radio Corp. v. Hazeltine Research, Inc., *supra*. *Zenith* presented the question whether it was clearly erroneous for the district court to sustain claims of injury in the Canadian, English and Australian markets. The Court upheld the district court as to the Canadian market, but reversed as to the English and Australian markets. With regard to the Canadian market, it was permissible for the trial court to draw the inference of causation on the showing of violation and damage. The Court did not find that the inference must be drawn as a matter of law. 395 U. S.

at 123, 89 S. Ct. 1562. The inference was not found supportable as to the English and Australian markets because proof was adduced to the effect that independent managerial decisions caused Zenith not to sell in those markets. I made similar findings after trial in this case that the decisions as to purchases by General Motors were independently made. As the Court said in the first du Pont opinion:

> "Similarly, the fact that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors, does not defeat the Governments's right to relief." 353 U. S. at 607, 77 S. Ct. at 884.

Further, the proof found in *Zenith* as being sufficient to establish the fact of injury is not comparable to the proof in this case.

To the extent that any analogy can be drawn from *Zenith,* it supports my conclusions.

Judgment to be entered accordingly. So ordered.

414 F.2d 956

Callman GOTTESMAN, Maria Mattiello, and Paul J. Peyser, Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION and E. I. Du Pont De Nemours & Company, Defendants-Appellees.

Nos. 304-306, Docket 32412-32414.

United States Court of Appeals
Second Circuit.

Argued April 14, 1969.
Decided Aug. 13, 1969.

[957] David Brady, New York City (O'Connor & Farber; Gordon, Brady, Caffrey & Keller, Netter, Netter, Dowd, Fox & Ness, Leo Brady, Clendon H. Lee, Arthur B. Netter, Henry L. Bayles, Abbott Gould, New York City, on the brief), for plaintiffs-appellants.

Daniel M. Gribbon, Washington, D. C. (Covington & Burling, Washington, D. C., Littauer, Gordon, Ullman, Riseman & Ploscowe, New York City, Hugh B. Cox, Frank H. Gordon, New York City, Irving S. Shapiro, Wilmington, Del., on the brief), for defendant-appellee E. I. du Pont de Nemours & Co.

Edward B. Wallace, New York City (Ross L. Malone, William A. Grier, John R. Anderson, Detroit, Mich., John J. Higgins, New York City, on the brief), for defendant-appellee General Motors Corporation.

Before WATERMAN, SMITH and FEINBERG, Circuit Judges.

FEINBERG, Circuit Judge:

I. *Background.*

Plaintiffs, minority stockholders of General Motors Corporation, appeal from a judgment for defendants General

Motors and E. I. du Pont de Nemours & Company entered in the United States District Court for the Southern District of New York after a trial without a jury before Charles M. Metzner, J., 279 F. Supp. 361 (1967). Plaintiffs brought this derivative antitrust action in June 1957,[1] immediately after the Supreme Court's opinion in United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed. 2d 1057 (1957). That decision reversed a district court dismissal of an antitrust action brought against du Pont and General Motors, among others. The Court held that du Pont's commanding position as a supplier of automotive finishes and fabrics to General Motors, obtained at least in part by its ownership of a 23 per cent stock interest in General Motors, violated section 7 of the Clayton Act, 15 U.S.C. § 18, since acquisition of the stock raised a reasonable probability of the creation of a monopoly in that line of commerce. While the Government had also alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, the Court did not decide the appeal from the district court's dismissal of those charges. 353 U.S. at 588 n. 5, 77 S.Ct. 872. In a later decision, the Court held that the proper remedy for the Clayton Act violation was complete divestiture by du Pont of its General Motors stock. United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 81 S.Ct. 1243, 6 L.Ed. 2d 318 (1961).

The present civil action for treble damages was brought pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15, alleging that du Pont had violated section 7 of the Clayton Act and sections 1 and 2 of the Sherman Act, and had breached its common law fiduciary duty. Specifically, plaintiffs claimed that subsequent to May 4, 1950,[2] du Pont

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[1] An amended consolidated complaint was filed in November 1959.

[2] This was apparently the earliest date at which any plaintiff owned General Motors stock.

utilized its stock control to insure its position as primary supplier to General Motors of a variety of products, thereby preventing actual and potential competition from other suppliers and enabling du Pont to [958] sell General Motors its products at excessive prices. In September 1963, Judge Metzner issued an opinion dealing with the effect to be given to the Supreme Court judgment in the first *du Pont* case, explaining that a decision on that issue in advance of trial was necessary in order to define the scope of deposition-discovery procedures. 221 F. Supp. 488. The judge held that a violation of section 7 of the Clayton Act did not constitute a cause of action for money damages. Moreover, since the Supreme Court judgment dealt only with the situation of the two corporations as of June 1949, the judgment was not available to the plaintiffs, who were suing for acts committed after May 4, 1950, on their other claims, except "for historical purposes and background material." The judge disagreed with plaintiffs' contention that the Supreme Court had found an actual restraint of trade by du Pont, stating that the Court had found only a "reasonable probability of the creation of a monopoly." In a subsequent Pretrial Order dated November 12, 1963, Judge Metzner held that the only "ultimate facts" determined by the *du Pont* decision which might be prima facie evidence in the case at bar were:

(a) that du Pont acquired 23% of the stock of General Motors;

(b) that automotive finishes and fabrics constitute a substantial "relevant market" within the meaning of the Clayton Act;

(c) that said acquisition of stock by du Pont was not solely for investment;

(d) that General Motors' share of the "relevant market" for automotive finishes and fabrics was substantial;

(e) that du Pont supplied a substantial share of that market;

(f) that du Pont used its stock interest in General Motors to entrench itself as the primary supplier to General Motors of automotive finishes and fabrics and that du Pont controlled General Motors to that extent.

The judge dismissed plaintiffs' claim for money damages under section 7 of the Clayton Act as a matter of law, but certified the order for immediate appeal. This court denied leave to appeal from that order on January 31, 1964, and the Supreme Court denied certiorari, 379 U.S. 882, 85 S.Ct. 144, 13 L.Ed. 2d 88 (1964).

After extensive pre-trial and discovery proceedings, the claims relating to du Pont's sales of automotive fabrics and finishes for passenger cars manufactured by General Motors came to trial in November 1966 solely on the questions of liability of du Pont and injury to General Motors as distinguished from the quantum of damages. The trial continued until late January 1967; thereafter Judge Metzner filed his opinion, dismissing these causes of action. He found that du Pont had not used its stock ownership to control General Motors' purchases of automotive finishes or fabrics or to insulate General Motors from competition in either line of commerce in violation of section 1 or 2 of the Sherman Act and that du Pont had not abused any fiduciary duty to General Motors. On March 29, 1968, final judgment was entered after a finding pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that more than one claim for relief had been presented and that there was no just reason for delay. This finding was upheld by this court in denying defendants' motion to dismiss plaintiffs' appeal in July 1968. 401 F.2d 510.

On this appeal plaintiffs argue that numerous issues of law and fact were incorrectly decided by the court below.

We do not have to reach most of these claims, however, for we find that the rulings in Judge Metzner's Pretrial Opinion of September 18, 1963, and their application to the case at trial, were sufficiently erroneous to require remanding the action for further consideration. In particular, we hold that Judge Metzner erred in deciding that a violation of sec [959] tion 7 of the Clayton Act cannot support a private cause of action for money damages, and that he improperly restricted the scope and weight of the government judgment in the first *du Pont* case as applied to the case at bar. Because of this disposition of the case, we need summarize only briefly the relevant facts set out at length in the *du Pont* opinion and in the opinion of the district court.

During the second decade of the century, du Pont acquired a number of manufacturing operations in automotive fabrics and paints. Considering other areas of further expansion, the corporation became interested in purchasing General Motors stock, both as a profitable investment and because General Motors constituted a large potential market for du Pont products. In 1917, du Pont decided to acquire $25,000,000 worth, or 23 per cent, of the outstanding common stock of General Motors. While the precise percentage of ownership varied for a number of years, it remained at 23 per cent from 1939 on. At least in the first few years after du Pont's stock acquisition, the company made substantial and successful efforts to insure that the maximum share of General Motors' purchases of automotive fabrics and finishes were from du Pont. As the Supreme Court found in the first *du Pont* case, these purchases constituted a substantial part of the total market. Thus, in 1946 and 1947, when General Motors purchased approximately one half of all such products, du Pont supplied 67 and 68 per cent, respectively, of General Motors' requirements for finishes and 52.3 and 38.5 per cent of its fabric requirements. 353 U.S. at 596, 77 S.Ct. 872. During

the years covered by the case at bar, the district court found that General Motors' share of the automobile market varied 41 per cent and 52.7 per cent and that du Pont's share of General Motors' purchases averaged at 21 per cent for automotive fabrics and 74 per cent for automotive finishes. 279 F.Supp. at 369. From 1951 to 1959, du Pont sold from 89.2 per cent to 96.2 per cent of its total production of automotive finishes to General Motors and during 1955 to 1959 du Pont's sales of automotive fabrics to General Motors averaged 86 per cent of du Pont's production. *Id.* at 380-381.

In holding that du Pont's stock purchase resulted in a violation of section 7 of the Clayton Act, the Supreme Court found that "immediately after the acquisition, du Pont's influence growing out of it was brought to bear within General Motors to achieve primacy for du Pont as General Motors' supplier of automotive fabrics and finishes," 353 U.S. at 602, 77 S.Ct. at 882, and that "[t]he inference is overwhelming that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit." *Id.* at 605, 77 S.Ct. at 883. The Court referred to "the fact, plainly revealed by the record, that du Pont purposely employed its stock to pry open the General Motors' market to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics." *Id.* at 606, 77 S.Ct. at 884. This answered the question, posed by the Court at the outset of its opinion, "whether du Pont's commanding position * * * was achieved * * * because its acquisition of the General Motors' stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce." *Id.* at 588-589, 77 S.Ct. at 875. The Court did not determine whether there

was an actual restraint of competition at the time, but noted:

> The conclusion upon this record is inescapable that such likelihood was proved as to this acquisition. The fire that was kindled in 1917 continues to smolder. It burned briskly to forge the ties that bind the General Motors market to du Pont, and if it has quieted down, it remains hot, and, from past [960] performance, is likely at any time to blaze and make the fusion complete.

Id. at 607, 77 S.Ct. at 884.

II. *Treble damages under section 7 of the Clayton Act.*

Section 4 of the Clayton Act, 15 U.S.C. § 15, states:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained * * *.

The Supreme Court's first *du Pont* decision established that du Pont's acquisition of General Motors' stock was a type forbidden under section 7. In his 1963 pre-trial opinion, however, 221 F. Supp. at 493, Judge Metzner noted that:

> No case has been found discussing the question whether damages can be recovered for a violation of section 7 of the Clayton Act, and no case has been found where damages have been awarded for such a violation.

After distinguishing two cases he concluded:

> The test of a section 7 violation is whether "there is a reasonable probability that the acquisition is likely to result in the condemned restraints." United States v.

> E. I. du Pont de Nemours & Co., supra, 353 U.S. at 607, 77 S.Ct. [872] at 884, 1 L.Ed.2d 1057. Plaintiffs cannot be damaged by a *potential* restraint of trade or monopolization. There can be no claim for money damages for a violation of section 7.

Other district courts have subsequently reached the same conclusion, see, e.g., Highland Supply Corp. v. Reynolds Metals Co., 245 F.Supp. 510 (E.D.Mo. 1965); Bailey's Bakery Ltd. v. Continental Baking Co., 235 F.Supp. 705, 716-717 (D. Hawaii 1964), and one circuit court has approved it in dictum, see Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725, 728 n. 3 (8th Cir. 1964). However, other courts have disagreed. Both the Fifth Circuit, see Dailey v. Quality School Plan, Inc., 380 F.2d 484, 488 (5th Cir. 1967), and Judge McLean in the Southern District of New York, see Julius M. Ames Co. v. Bostitch, Inc., 240 F.Supp. 521, 523-526 (S.D.N.Y. 1965), have held that there can be a claim for money damages for a violation of section 7, though the latter case contains some qualifying language. Moreover, a number of other cases have impliedly sanctioned such a cause of action, dismissing or affirming the dismissal of section 7 money damage claims only for the lack of a sufficient showing of specific, proximate injury. See, e. g., Blaski v. Inland Steel Co., 271 F.2d 853 (7th Cir. 1959); Bender v. Hearst Corp., 263 F.2d 360, 370 (2nd Cir. 1959); Rayco Manufacturing Co. v. Dunn, 234 F.Supp. 593, 597 (N.D.Ill.1964). In Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965), the Supreme Court itself held that the statute of limitations did not bar a private, treble-damage action based on alleged violations of both section 7 of the Clayton Act and sections 1 and 2 of the Sherman Act; although the issue was not discussed, the Court evinced no qualms

about dealing with a section 7 money damage claim. Finally, commentators have overwhelmingly supported the conclusion that section 7 does give rise to a treble-damage action. See, e. g., J. Scott & E. Rockefeller, Antitrust and Trade Regulation Today: 1967, at 340-42 (1967); Stein, Section 7 of the Clayton Act as a Basis for the Treble-Damage Action: When May the Private Litigant Bring His Suit?, 56 Calif.L. Rev. 968, 971-80 (1968); Note, Private Actions under Sections 4 and 7 of the Clayton Act: A Fresh Look at an Old Problem, 29 Ohio St. L.J. 756 (1968); 64 Colum.L.Rev. 597 (1964); 79 Harv. L.Rev. 445 (1965).

[1] We agree with those authorities cited above that indicate that a violation of section 7 of the Clayton Act does furnish a basis for a claim for money dam [961] ages under the broad language of section 4 of the Act. To begin with, section 1 of the Act, 15 U.S.C. § 12, defines "antitrust laws" as including "this Act," and it seems clear to us that section 7 of the Clayton Act is an antitrust law within the meaning of section 4 of the same Act. This proposition is not the truly disputed one in the above-cited cases or even in this one. The trial judge did not hold that section 7 is not an antitrust law, nor do defendants so contend. The basis of the pre-trial ruling was that a section 7 violation can cause no damage because it establishes only that harm was threatened, not that it occurred. But if the threat ripens into reality we do not see why there can never be a private cause of action for damages. If section 7 is designed to prevent acquisitions that "may" or "tend to" cause specified harm, such an acquisition may either itself directly bring about the harm or make possible acts that do. We do not say that a section 7 violation must, or even probably will, have that result; but that it may and that plaintiffs should have a chance to prove injury "by reason of" the violation are persuasive prop-

ositions. The Supreme Court seems to have recognized as much in the first *du Pont* decision, 353 U.S. at 597, 77 S.Ct. at 879, when it rejected the argument that section 7 is applicable only to acquisition of stock and not to the holding or subsequent use of it:

> Its [the Clayton Act's] aim was primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case.

Damages have been allowed to private litigants under sections 2 and 3 of the Clayton Act, 15 U.S.C. §§ 13, 14, which are also aimed at anticipated injury and proscribe certain activities when "the effect * * * may be * * * to lessen competition or tend to create a monopoly." See Stein, *supra*, 56 Calif. L.Rev. at 979 & nn. 47-50. Finally, if we had any real doubts on this issue, we would resolve them in favor of a broad, rather than a narrow, construction of section 4, because "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318, 85 S.Ct. 1473, 1477, 14 L.Ed.2d 405 (1965).

Of course, plaintiffs cannot rest on a showing of a violation of section 7; they must, as in private actions under other sections of the antitrust laws, prove that they have been injured by the violation. However, the Supreme Court's finding that du Pont's stock ownership in General Motors constituted a "potential" restraint of trade or monopolization hardly precludes a showing that a given party was in fact injured by the prohibited acquisition, or that the section 7 violation proximately caused damage

which might not in itself constitute a cause of action under the Sherman Act. *Cf.* the examples given in J. Scott & E. Rockefeller, Antitrust and Trade Regulation Today: 1967, at 342 (1967). Appellee argue that even assuming that a cause of action for damages lies under section 7, appellants suffered no prejudice from the district court's ruling as they specifically failed to prove any injury at trial. However, in view of the fundamental nature of the error here, we think that the district court should be given the opportunity to reconsider the evidence before it in the light of our holding that injury from a section 7 violation, as distinct from the alleged Sherman Act claims, is ground for treble damages. The advisability of such a re-examination is furth r supported by the evidentiary effect which the Supreme Court's finding of a section 7 violation may have on the plaintiffs' claims, a subject discussed below.

III. *Effect of the first du Pont judgment.*

In his September 18, 1963 opinion, Judge Metzner ruled that since the judg [962] ment in the first Supreme Court *du Pont* case covered a different time period than the case at bar, the "ultimate facts" determined in that judgment could not be used against the defendants under section 5(a) of the Clayton Act, 15 U.S.C. § 16(a):

> A final judgment or decree * * hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws * * as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.

He concluded that "plaintiffs may introduce in evidence the decree in the government suit, for historical purposes and background material * * *. Plaintiffs, however, will have to submit other proof of the existence of the facts on which they base their claims." 221 F. Supp. 488, 494. In his pre-trial order of November 12, 1963, the judge listed the "ultimate facts" inherent in the Supreme Court decision, see page 958 *supra,* which were "prima facie evidence of ultimate facts in this suit, "but again limited their availability to plaintiffs:

> The final judgment entered March 1, 1962 in said Government suit may be introduced in evidence on the trial of this action for historical purposes and as background material. The judgment in the said Government suit speaks as of June 30, 1949. The present plaintiffs may only recover damages for acts occurring after May 4, 1950.

In his final opinion in December 1967, 279 F.Supp. 361, 364, the judge noted that a violation of section 7 of the Clayton Act requires no showing "that restraint or monopoly was intended, nor that actual anticompetitive effects flowed from the acquisition." Since "[t]here was no finding of private injury either to the competitors of du Pont or to General Motors itself" in the *du Pont* decision, the judge came to the "conclusion that the Court's language about entrenchment is not entitled to great weight as prima facie evidence in this case." Again the court noted: "The time period encompassed in the Government suit has been deemed relevant in this trial, however, to place the facts in dispute here in historical perspective."

Although Judge Metzner seemed to imply that "the Court's language about entrenchment" was entitled to *some* evidentiary weight, and one of the "ultimate facts"

found in its November 1963 order was that "du Pont used its stock interest in General Motors to entrench itself as the primary supplier to General Motors," we interpret the net effect of the above comments to be that the judgment in the government case was given little or no substantive legal effect on the issues at trial. Since we think that that judgment was entitled to substantially greater impact than a limited use as "historical perspective" or "background material," we find it necessary to remand the case for Judge Metzner's further consideration in light of the principles we will set forth hereinafter.

Considerable controversy has arisen under section 5(a) of the Clayton Act over the proper evidentiary use to be made of government antitrust judgments covering violations prior in time to those alleged as a basis for damages in a subsequent treble-damage action. See generally Shores, Treble Damage Antitrust Suits: Admissibility of Prior Judgments Under Section 5 of the Clayton Act, 54 Iowa L.Rev. 434, 446-49 (1968); Timberlake. The Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws, 36 N.Y.U.L. Rev. 991, 998-1002 (1961). Thus, some decisions have taken the strict view that a government judgment may not be introduced as evidence at all unless it covers the same, or part of the same, period as that in question in the private action. See International Shoe Machine Corp. v. United [963] Shoe Machinery Corp., 315 F.2d 449 (1st Cir.), cert. denied, 375 U.S. 820, 84 S.Ct. 56, 11 L.Ed.2d 54 (1963); Orbo Theatre Corp. v. Loew's Inc., 156 F.Supp. 770, 777 (D.D.C.1957), aff'd per curiam, 104 U.S.App.D.C. 262, 261 F.2d 380 (D.C. Cir. 1958), cert. denied, 359 U.S. 943, 79 S.Ct. 725, 3 L.Ed.2d 677 (1959); cf. Webster Rosewood Corp. v. Schine Chain Theatres, Inc., 263 F.2d 533 (2d Cir.), cert. denied, 360 U.S. 912, 79 S.Ct. 1296, 3 L.Ed.2d 1261 (1959). Other cases, however, appear to embody a

more flexible approach to the question, evaluating the actual relevancy or materiality of the government judgment to the facts and issues in the private suit, even though the period covered by each may differ. See, e. g., Park Neponset Corp. v. Smith, 258 F.2d 452 (1st Cir. 1958); Eagle Lion Studios, Inc. v. Loew's, Inc., 248 F.2d 438, 442-445 (2d Cir. 1957), aff'd by an equally divided Court, 358 U.S. 100, 79 S.Ct. 218, 3 L.Ed.2d 147 (1958); Alamo Theatre Co. v. Loew's Inc., 143 F.Supp. 419 (N.D.Ill.1956); Buckhead Theatre Co. v. Atlanta Enterprises, Inc., 327 F.2d 365 (5th Cir.), cert. denied, 379 U.S. 888, 85 S.Ct. 158, 13 L.Ed.2d 92 (1964). While it is true that in none of these latter cases was the earlier government judgment allowed into evidence,[3] it is equally true that no flat inflexible rule of exclusion was applied. The rationale which emerges from them is that while a judgment of violation in a government suit covering a given period is insufficient to establish a violation at a later date, that judgment may be of evidentiary weight in the private action if it encompasses findings sufficiently related to the issues of the private action and if sufficient additional evidence is adduced to show that the illegal activities condemned in the government decree carried over into the period in issue. This approach, which negates an "all or nothing" position, see Buckhead Theatre Co. v. Atlanta Enterprises, Inc. *supra,* 327 F.2d at 370 (concurring opinion), perhaps finds some support in Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954). In that case, the Supreme

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[3] In the *Alamo Theatre* case, the court deferred determination of the question of admissibility until trial, noting that the "mere fact of plaintiff's entry into the motion picture field subsequent to a conspiracy found to exist in 1945 is not alone sufficient for the court to rule as a matter of law that the Paramount decree has no relevance to the instant suit." 143 F.Supp. at 420-421.

Court affirmed a jury verdict for defendants in a treble-damage action under the Sherman Act. The trial judge had allowed the introduction of the decrees in a prior government suit against the defendants, although that judgment was an injunction in 1948, at the latest, of a conspiracy found to exist in 1945, and the private plaintiff claimed damages from a conspiracy in 1949 and 1950. The jury was instructed that these decrees were not sufficient to support recovery in themselves and that the plaintiff had to produce additional evidence relating that conspiracy to the period and location of the alleged conspiracy in issue. Appellant contended that greater weight should have been given to the government judgment; appellees argued that it should have been given no weight at all. The Court rejected appellant's argument, noting that "the relevancy of [the government suit] to the instant case is slight." 346 U.S. at 544, 74 S.Ct. at 261. It declined to pass on appellees' contention. While *Theatre Enterprises* circumvented the question here in issue, the Court's reference to the "relevancy" of the government judgment to the private action suggests that it may have been "deliberately avoiding an inflexible rule." Shores, *supra,* 54 Iowa L.Rev. at 447.

[2] Certainly there are circumstances here suggesting that it is both appropriate and desirable to give substantial evidentiary weight to the judgment entered in *du Pont I.* The case is being tried to a judge rather than to a jury, thus minimizing the nagging problem of undue prejudice referred to in many of **[964]** the cases. See, e. g., Buckhead Theatre Co. v. Atlanta Enterprises, Inc., 327 F.2d 365, 368 (5th Cir.), cert. denied, 379 U.S. 888, 85 S.Ct. 158, 13 L.Ed.2d 92 (1964); International Shoe Machine Corp. v. United Shoe Machinery Corp., 315 F.2d 449, 459 (1st Cir.), cert. denied, 375 U.S. 820, 84 S.Ct. 56, 11 L.Ed.2d 54 (1963). The defendants in the two actions are identical and the

same product lines and geographical market are involved. Very similar issues of fact and law are raised in the two cases; important substantive elements of plaintiffs' cause of action under section 7 of the Clayton Act are precisely the same as those determined against defendants by the government *du Pont* judgment. Moreover, while it is true that the complaint which led to the first *du Pont* decision was filed in the district court in June 1949, it would be formalistic in the extreme to ignore the fact that the position of stock ownership which was the crux of the violation existed on June 3, 1957, when the Court in *du Pont I* reversed the district court and ordered it to grant "appropriate" equitable relief and continued to exist until after the Court decreed complete divestiture by du Pont in 1961. Nor does it seem improper to give realistic recognition to the Court's language in both *du Pont* decisions for an understanding of what the government case actually decided. Thus, in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 485, 88 S.Ct. 2224, 2227, 20 L.Ed.2d 1231 (1968), the Court made clear that:

> We are not, however, limited to the decree in determining the extent of estoppel resulting from the judgment in the Government's case. If by reference to the findings, opinion, and decree it is determined that an issue was actually adjudicated in an antitrust suit brought by the Government, the private plaintiff can treat the outcome of the Government's case as prima facie evidence on that issue.

Moreover, the Court specifically noted that it would be proper in determining the effect of the judgment in a government case to look to earlier opinions both "with respect to violation and * * with respect to remedy." *Id.* It is significant, therefore, that in its second *du Pont* decision,

366 U.S. 316, 318-319, 81 S.Ct. 1243, 1246 (1961), the Court apparently regarded its 1957 holding as encompassing not only an antitrust violation but also injury, summarizing its prior decision:

> We held that du Pont's acquisition of the 23 percent of General Motors stock *had led to the insulation from free competition* of most of the General Motors market in automobile finishes and fabrics * * *. [Emphasis added.]

We do not agree entirely with the lower court's statement that "[t]he thrust of the [first *du Pont*] opinion was directed to show the probability of public injury based on events quite far removed from the time period with which we are concerned herein." 279 F.Supp. at 364. The Court in that decision did not focus exclusively on evidence relating to the early years of the du Pont stock acquisition but relied as well on such recent factors as the growing substantiality of the relevant market up to 1955, 353 U.S. at 595 n. 16, 77 S.Ct. 872, and on the fact that Fisher Body, a division of General Motors which had long stubbornly resisted du Pont sales pressure, only gave in at last to that pressure in 1947 and 1948. *Id.* at 604-605, 77 S.Ct. 872. The Court also noted that "[t]he potency of the influence of du Pont's 23% stock interest is greater *today*," *id.* at 607 n. 36, 77 S.Ct. at 884 (emphasis added), because of the diffusion among a larger number of stockholders of the non-du Pont owned shares. In short, the language of the Court is directed to a real present danger of impairment of competition. In its 1961 decision, the Court clearly indicated that this danger continued to be present, holding that even the partial divestiture plan proposed by the district court would not insure the elimination of "the tendency towards monopoly of the acquisi **[965]** tion condemned by § 7." 366 U.S. at 331-332, 81 S.Ct. at 1253.

It is important to distinguish this case from the more usual situation in which plaintiffs seeks to apply to a subsequent period a government judgment condemning activities prohibited under the antitrust laws, where it is not unreasonable to assume that defendants ceased those activities after the prohibition. Here the very acquisition and position of potential control which was found violative of the Clayton Act as of 1949 continued through 1961. We need not dispute the statement of the district court that, in the ordinary antitrust case, there is no "presumption of continuance of unlawful conduct," 221 F.Supp. 488, 493 (1963). Here, however, what was unlawful was du Pont's status as stockholder in General Motors, and that status continued until divestiture.

Accordingly, while we make no attempt to formulate a general rule on the effect to be given to government judgments relating to earlier time periods, we hold that under the circumstances of this particular litigation, the judgment in the Government's suit was entitled to greater evidentiary weight than was accorded it by the court below. We are aware that the judgment is only prima facie evidence at best and that plaintiffs have the burden of showing not only antitrust law violation but injury as well. However, it must be remembered that if the latter fact is established to the satisfaction of the trier, "the standard of proof as to the quantum of damages is less severe," as appellee du Pont concedes.[4] See, e. g., Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-266, 66 S.Ct. 574, 90 L.Ed. 652 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); Flintkote Co. v. Lysfjord, 246 F.2d 368, 392 (9th Cir.), cert. denied, 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46

[4] Brief for Appellee du Pont at 37 n. 36.

(1957). In any event, as to all the issues, the trier of fact must make the determination, giving proper weight to the earlier judgment, and the district court may allow further evidence, although it is not required to. While we do not know whether it will reach the same conclusions as before on the record before it, plaintiffs are entitled to a determination which gives greater consideration to the earlier rulings of the Supreme Court.

Accordingly, we remand for further proceedings consistent with this opinion. In view of this disposition of the appeal, we find it unnecessary to rule or express any views on appellants' additional arguments that the trial judge erroneously held that du Pont had not violated the Sherman Act[5] or breached any fiduciary duty to General Motors.

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[5] Appellants do not press on appeal the lower court's finding as to § 1 of the Sherman Act but have relied primarily on an alleged violation of § 2.

279 F.Supp. 361

Callman GOTTESMAN et al., Plaintiffs,

v.

GENERAL MOTORS CORPORATION and E. I. du Pont de Nemours & Company, Defendants.

No. Civ. 121-251.

United States District Court
S. D. New York.
Dec. 13, 1967.

[363] O'Connor & Farber, Gordon, Brady, Caffrey & Keller and Netter, Netter, Dowd, Fox & Ness, New York City, for plaintiffs; David Brady, Leo Brady, Clendon H. Lee, Arthur B. Netter, Henry L. Bayles and Abbott Gould, New York City, of counsel.

Edward B. Wallace, New York City, and Henry M. Hogan, Detroit, Mich., for defendant General Motors Corporation; William A. Grier and John J. Higgins, New York City, John R. Anderson and Aloysius F. Power, Detroit, Mich., of counsel.

Covington & Burling, Washington, D. C., and Littauer, Gordon, Ullman & Riseman, New York City, for defendant E. I. du Pont de Nemours & Company; Hugh B. Cox, Daniel M. Gribbon and Harris Weinstein, Washington, D. C., Frank H. Gordon, New York City, and Irving S. Shapiro, Wilmington, Del., of counsel.

METZNER, District Judge.

[1] This is a derivative action brought by minority stockholders of General Motors Corporation (General Motors) against E. I. du Pont de Nemours & Company (du Pont) claiming damages flowing from alleged violations

of §§ 1 and 2 of the Sherman Act[1] (15 U.S.C. §§ 1, 2) and breach of common law fiduciary duty.[2] It is alleged that, by reason of du Pont's stock interest in General Motors, it dominated and controlled the latter in the purchase of du Pont products. The court has jurisdiction of the subject matter of the action and of the parties.[3]

The case at bar, by stipulation of counsel, has dealt only with the question of liability on the claims pertaining to automotive fabrics and finishes used in the manufacture of passenger cars.[4] Some 10,000 pages of testimony have been taken and 1,000 exhibits admitted into evidence.

The primary issues here are whether du Pont after May 4, 1950 controlled General Motors to the extent that it entrenched itself as the primary supplier to the latter of automotive fabrics and finishes, that it insulated the General Motors market from free competition in these products, and that as the result of such activity it caused injury to General Motors.

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[1] § 1 of the Sherman Act provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

§ 2 of the Sherman Act provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, * * * shall be deemed guilty of a misdemeanor * * *."

[2] The court has previously determined that plaintiffs may not maintain a claim under § 7 of the Clayton Act. 221 F.Supp. 488.

[3] Plaintiff Mattiello was not a stockholder at the time of trial, and consequently her claim is dismissed. Sorin v. Shahmoon Indus., Inc., 30 Misc.2d 408, 429, 220 N.Y.S.2d 760, 780 (Sup. Ct. 1961).

[4] Claims were also asserted concerning fluoride compound refrigerants (Freon), refrigerator finishes and tetraethyl lead.

An essential part of the background of this lawsuit is the first Supreme Court opinion in an antitrust action brought by the United States against du Pont, General Motors et al. See United States v. E. I. du Pont De Nemours & Co., 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957).[5] The Government, in that action, alleged violations of § 7 of the Clayton Act[6] (15 U.S.C. § 18) and §§ 1 and 2 of the Sherman Act. The [364] Court found that § 7 of the Clayton Act had been violated; it did not pass upon the claimed violations of Sherman 1 and 2,[7] and the district court judgment dismissing those claims was vacated.[8] The Court found that at the time of the suit, June 30, 1949, the stock ownership acquired in 1917 had a "reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce."[9] 353 U.S. at 597, 77 S.Ct. 872. In arriving at this conclusion, the Court noted that

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[5] In a later opinion the Court determined that the proper remedy was divestiture by du Pont of its stockholdings in General Motors. United States v. E. I. du Pont De Nemours & Co., 366 U.S. 316, 81 S.Ct. 1243, 6 L.Ed.2d 318 (1961).

[6] § 7 of the Clayton Act provides:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[7] 353 U.S. at 588 n. 5, 77 S.Ct. at 875. "In view of our determination of the case, we are not deciding the Government's appeal from the dismissal of the action under the Sherman Act."

[8] 366 U.S. at 335, 81 S.Ct. 1243, 6 L.Ed. 2d 318.

[9] The Court rejected the argument that § 7 is applicable only to acquisition of the stock and not to the holding or subsequent use of the stock. "Its [Clayton Act's] aim was primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case." 353 U.S. at 597, 77 S.Ct. at 879.

> "du Pont purposely employed its stock to pry open the General Motors market to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics." 353 U.S. at 606, 77 S.Ct. at 884.

Both the majority and dissenting opinions agreed that to find a violation of § 7 it need not be shown that restraint or monopoly was intended, nor that actual anticompetitive effects flowed from the aquisition. The Court stated that:

> "[T]he fact that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors, does not defeat the Government's right to relief. It is not requisite to the proof of a violation of § 7 to show that restraint or monoply was intended." 353 U.S. at 607, 77 S.Ct. at 884.

There was no finding of private injury either to the competitors of du Pont or to General Motors itself. The thrust of the opinion was directed to show the probability of public injury based on events quite far removed from the time period with which we are concerned herein. Recently the Court indicated that a finding of control was not necessary for its decision in the *du Pont* case. Denver & R. G. W. R. R. v. United States, 387 U.S. 485, 501, 87 S.Ct. 1754, 18 L.Ed.2d 905 (1967). All of this leads to the conclusion that the Court's language about entrenchment is not entitled to great weight as prima facie evidence in this case.

Liability on both the antitrust claims and common law claims is limited to the period commencing with May 4, 1950 (28 F.R.D. 325). As indicated, the Government suit speaks

as of June 30, 1949. The time period encompassed in the Government suit has been deemed relevant in this trial, however, to place the facts in dispute here in historical perspective.

The Relationship Between the Corporations

The history of the relationship between du Pont and General Motors covers a period of 45 years, going back to 1914 when Pierre S. du Pont, Irenee du Pont and John J. Raskob individually purchased shares in General Motors. In 1917, on Raskob's recommendation (he was treasurer of du Pont), the du Pont Company decided to acquire $25,000,000 worth of the common stock of General Motors, which amounted to approximately 23% of the outstanding issue. Subsequent transactions first increased and then decreased the percentage of stock owned by du Pont. By 1939 it was back to 23% and remained at that figure [365] throu[illegible] the period covered by this lawsuit.

Raskob's report to the Finance Committee of du Pont in 1917, which was the basis for the decision to purchase General Motors stock, gave several reasons, in addition to the investment potential, to justify the purchase. They were:

> "1. With Mr. Durant we will have joint control of the companies.
>
> * * * * * *
>
> "5. Our interest in the General Motors Company will undoubtedly secure for us the entire Fabrikoid, Pyralin, paint and varnish business of those companies, which is a substantial factor."

William C. Durant at the time controlled just over 50% of General Motors stock.

By 1917 du Pont had already acquired the Fabrikoid Company (1910), the largest manufacturer of artificial leather in the country; the Arlington Company (1915), one of the two largest manufacturers of celluloid in the country; the Fairfield Rubber Company (1916), a manufacturer of rubber-coated fabrics for automobiles, whose principal customer was the Ford Motor Company; the Harrison Brothers & Company, Inc. (1917), the Beckton Chemical Company (1917), and the Bridgeport Wood Finishing Company (1917). The three latter companies manufactured paints and varnishes.

In 1918, after the acquisition of the General Motors stock, du Pont purchased the controlling interest in Flint Varnish & Chemical Works, which had been supplying almost all the paint requirements of Buick, Oakland, Olds and Chevrolet, components of General Motors. Flint also sold to other automobile manufacturers. By 1920 the Flint company could not meet the demand of General Motors and its other customers, and business was being lost to competitors of du Pont. In order to enlarge its paint product capacity, du Pont purchased the majority interest in the Chicago Varnish Company.

By reason of du Pont's purchase of the original 23% stock interest, it nominated six members of the 20-member Board of Directors of General Motors. During the period 1920 to 1923 the number of directors was increased to 31, but the number of du Pont nominees remained at six. During the same period the committees of the board of General Motors consisted of the Finance Committee and the Executive Committee, both of which were controlled by du Pont nominees.

In 1920, because of personal financial difficulties, Durant was forced to liquidate his interest in General Motors. As a result du Pont increased its holdings in General Motors

to 38% of the common stock. Pierre du Pont became president of General Motors in order to more closely supervise its financial operations. He resigned in 1923 when he felt this objective had been achieved. During his tenure as president of General Motors he was also chairman of the Board of Directors of both General Motors and du Pont.

In 1921 Raskob indicated that point one of his 1917 memorandum was more than achieved with Durant's departure. In a report to the directors of du Pont on its investment in General Motors, he stated: "As the Directors know we are now in control of the company and are completely responsible for its politics and management * * *." I find that, up to the time in 1923 when Pierre du Pont resigned as president of General Motors, du Pont had active control of General Motors.

With the election of Alfred P. Sloan as president of General Motors in 1923, a distinct change took place. He had been a member of the Board of Directors of General Motors since 1918, when a corporation of which he was president was purchased by General Motors. Sloan proved to be an outstanding executive. He developed the top management of the corporation into two distinct groups, financial and operational. The Board of Directors maintained its over-all jurisdiction of management, but the basic [366] work was done by two of its committees—Executive and Finance. The Executive Committee concerned itself with operations and management of the business. The Finance Committee dealt with the availability and allocation of capital for operating the business, review of earnings for the purposes of recommending dividend policy, and administration of the bonus plan. The make-up of these committees will be discussed below.

Sloan was subsequently elected a member of the Board of Directors of du Pont, but he attended meetings in-

frequently and was not active in the operations of the company. His membership on the du Pont board did not make him a captive of du Point, and it did not affect the decisions he made in connection with his responsibilities to General Motors. On the other hand, it was natural for him to consult with persons in control of such a large block of stock in his company. He conferred with du Pont regarding potential members of the Board of Directors and the committees of General Motors which dealt with financial policy.[10] Over the years, du Pont's designees for membership on the General Motors board were chosen, with one exception, from members of du Pont's Finance Committee. Sloan suggested the names of persons to fill management positions on the board. When it came to selecting members from outside these two groups, Sloan would consult with various members of the board, and when he received the acquiescence of a large number of members, the formal nomination and election would follow.[11]

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[10] W. S. Carpenter, Jr., president of du Pont, once wrote to Sloan: "I think his [Lammot du Pont's] reasons for this are consistent with the position he has always taken, namely, that the du Pont representatives should not become too closely involved in the operating problems of General Motors, principally because of their lack of experience in such problems in General Motors."

[11] An interesting sidelight concerning the question of du Pont's control of General Motors is found in events surrounding Raskob's resignation in 1928 from the board of General Motors and as chairman of its Finance Committee. At the time Pierre du Pont was chairman of the Board of Directors. Raskob and du Pont became actively engaged in the campaign of Alfred E. Smith for President that year. Sloan was of the opinion that partisan political activity was detrimental to the interests of General Motors and its relationship to the buying public. This was especially true regarding Raskob, who was identified in the public mind as "Mr. General Motors." Sloan was successful, over the opposition of the du Pont nominees on the board, in forcing Raskob and du Pont to resign their positions. After the election they refused to return to their former positions despite the urging of Sloan.

Aside from the designation of the six persons (later reduced to five) to represent du Pont on the Board of Directors, no person was placed on the board because of insistence by du Pont. In fact, many of the suggestions made by du Pont for nonmanagement directors of General Motors were rejected. It is clear that du Pont's reactions to suggested changes or elevation of General Motors personnel to top level management were based solely on what was best for the successful operation of General Motors.[12] The correspondence contains evaluations and reactions in depth when [367] discussing these matters. There is no reference in this correspondence to business dealings between the two corporations as a factor in the advice given or the comments made. There is no evidence that the men chosen were in any way beholden to du Pont or were influenced by du Pont in the exercise of their duties.

There is no evidence in the record that after 1948 either Sloan or even his successors engaged in consultations with du Pont of the kind to which reference has been made.

Neither William S. Knudsen, Charles E. Wilson, Harlow H. Curtice nor Frederic G. Donner, who succeeded Sloan as either president or chairman of the board of General

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[12] The fact that du Pont's interest was directed toward the financial side of General Motors, rather than toward its operations, is reflected in much of the correspondence that deals with personnel in top management. An interesting observation is contained in a letter from W. S. Carpenter, Jr., president of du Pont to Donaldson Brown of General Motors. They had been discussing the capacities of several men, one of whom was Charles E. Wilson, who later was to become the president of General Motors. Carpenter wrote:

> "Again I wish to stress that I do not in the slightest belittle Mr. Wilson's capacities. I do say, however, that I do not feel that he has had the background of experience that Mr. Sloan had, and for this reason I question whether he has the same sympathy with and appreciation of the financial aspects of a corporation that Mr. Sloan has. As Mr. Sloan has expressed it in referring to other people—'He has never had the job of meeting the payroll at the end of the week'."

Motors, had ever been associated with du Pont. They had all come up through the ranks of General Motors and their advancement to the top was not as the result of the exercise of influence by du Pont.

The record shows the following composition of the Board of Directors during the period 1923-1958:

	Total	*du Pont*	*Management*	*Others*
1923	31	6	15	10
1942	26	6	17	3
1949	30	5	22	3
1953	34	5	23	6
1958	34	5	22	7

The Finance and Executive Committees functioned until 1937. During the period 1923-1937 du Pont's nominees on the board composed half of the membership of the Finance Committee, and less than a third of the membership of the Executive Committee.[13] In 1937 Sloan, over the objection of the du Pont nominees on the General Motors board, abolished these committees and created a single Policy Committee. It dealt with policy matters in both the financial and operational fields. At most, du Pont nominated three members of the nine-member policy Committee, whose membership changed only once until the committee was abolished in 1946, when Sloan retired as chief executive officer. An Administration Committee was created, consisting of General Motors operating personnel, which acted in an advisory capacity to the Policy Committee. No du Pont designee on the board was a member of this committee.

In 1946 the functions of the Policy Committee were divided between two newly created committees—Opera-

[13] I consider Donaldson Brown a du Pont nominee.

tions Policy and Financial Policy—each of which continued until 1958. The functions of these committees were similar to the former Executive and Finance Committees except that the responsibilities of the latter regarding the operation of the bonus plan were lodged in a new Bonus and Salary Committee. Du Pont was represented by three nominees on the ten-member Financial Policy Committee. No du Pont nominee served on the Operations Policy Committee, which consisted of the heads of the operating divisions of General Motors.

There were no discussions at meetings of the board or any of its committees of the purchasing policies of the operating divisions, either as to source of supplies or allocations of purchases. Nor did they discuss engineering practices in the selection of materials to be used in building the automobiles. There is no proof that any du Pont nominee on the board ever used his position to influence decisions in either of these areas in the last 30 years.

Control of General Motors by Du Pont

In 1949 there were 44,104,340 shares of General Motors stock outstanding in the hands of 403,352 shareholders. Du Pont owned 23% or 10,143,998 shares. 92% of the stockholders owned no more than 100 shares each. During the period 1950-1959 du Pont's percentage of the total votes cast at the annual meetings ranged from 27.1% to 29.9%.

[2] Corporate control is an inexact concept.[14] Certainly it carries with it *power* to direct corporate policy and con-

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[14] See Bayne, A Philosophy of Corporate Control, 112 U.Pa.L. Rev. 22, 29 (1963) (law has never advertently defined it). Compare 15 U.S.C. § 80a-2(a) (9) (Investment Company Act—25% or more presumption of control).

[368] siderable patronage.[15] According to a noted corporate scholar, " 'control' may be defined as the capacity to choose directors. As a corrollary, it carries capacity to influence the board of directors and possibly to dominate it." Berle, "Control" in Corporate Law, 58 Colum. L.Rev. 1212 (1958).

[3] Power to control through the election of directors may exist where a large block of shares, even though a minority, is owned by one group and the remaining shares are widely scattered. This is called practical or working control. In Insuranshares Corp. of Delaware v. Northern Fiscal Corp., 35 F.Supp. 22 (E.D.Pa.1940), the defendant was found to have practical control based on 27% ownership of stock. The court found that the majority of stockholders "bought for investment, [and] could be counted on to remain inert." 35 F.Supp. at 24.

In Perlman v. Feldmann, 219 F.2d 173 (2d Cir.), cert. denied, 349 U.S. 952, 75 S.Ct. 880, 99 L.Ed. 1277 (1955), Annot., 50 A.L.R.2d 1146 (1956), 68 Harv.L.Rev. 1274 (1955), the principal defendant owned 33% of the stock. The majority and minority opinions assumed this to be practical control.

In Essex Universal Corp. v. Yates, 305 F.2d 572, 13 A.L.R.3d 346 (2d Cir. 1962), two members of the panel agreed that 28.3% ownership of the stock of the corporation amounted to practical control. The court stated that it was "commonly known that equivalent power [to majority ownership] usually accrues to the owner of 28.3% of the stock." 305 F.2d at 575. It further stated that it was also

> "commonly known that a person or group owning so large a percentage of the voting stock of a corporation

[15] See Manne, Some Theoretical Aspects of Share Voting, 64 Colum.L.Rev. 1427, 1430 (1964).

> which, like Republic, has at least * * * 1,500 shareholders * * * is almost certain to have share control as a practical matter." 305 F.2d at 579.

The court placed the burden on the defendant to show otherwise.

It has been observed that the minority block interest has the power to control an election through the use of proxy machinery. Berle, supra, at 1213.

[4, 5] The quantum of proof necessary to determine the existence or rebut the inference of control varies with the particular purpose of the law involved. Compare Acampora v. Birkland, 220 F.Supp. 527, 543 (D.Colo.1963) (under Investment Company Act, actual domination), with Pacific Gas & Elect. Co., 10 S.E.C. 39, 55 (1941), aff'd, 127 F.2d 378 (9th Cir. 1942), aff'd on rehearing by an equally divided court, 139 F.2d 298 (1943), aff'd by an equally divided Court, 324 U.S. 826, 65 S.Ct. 855, 89 L.Ed. 1394 (1945) (under the Public Utility Holding Company Act, "control" includes power to control, and "controlling influence" includes susceptibility to domination), and SEC v. R. A. Holman & Co., 377 F.2d 665 (2d Cir. 1967) (under SEC rule 10b-6). Even if a holder of a large block of stock in a corporation whose shares are widely held does not exert full control, it may be inferred that management consults such an outside group. See Hill, The Sale of Controlling Shares, 70 Harv.L.Rev. 986, 996 & n. 28 (1957).

[6] I have come to the conclusion that du Pont, by reason of its 23% stock interest in General Motors, had the power to control that corporation because of the unrelated ownership of the balance of the shares.

It has been said:

> "It is difficult to see how du Pont could have had this unquestioned power over General Motors' finances

without at the same time exercising, *or having the power to exercise,* what is broadly understood as control over **[369]** other phases of the business. But there is also present in the correspondence reproduced in the briefs evidence of a division of responsibility between du Pont and the General Motors management. Control of finances is not the same thing as control of operations or purchasing." Dirlam & Stelzer, The Du Pont-General Motors Decision: In the Antitrust Grain, 58 Colum.L.Rev. 24, 33 (1958) (emphasis added).

The Antitrust Claims

The foregoing analysis suggests the problems that must be determined in this case. Did du Pont, which had the power to control, exercise that power, in violation of §§ 1 and 2 of the Sherman Act, in the purchases by General Motors of automotive fabrics and automotive finishes, and if it did, was General Motors injured thereby?

[7] In discussing the antitrust features of this case, "commerce," "relevant market" and "substantiality" must be determined. The Supreme Court found that "automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them * * * a 'line of commerce' within the meaning of the Clayton Act." 353 U.S. at 593-594, 77 S.Ct. at 877. It is evident that automotive fabrics and finishes are not reasonably interchangeable for use for the same purpose. Cf. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 395 & n. 23, 76 S.Ct. 994, 100 L.Ed. 1264 (1956); Brown Shoe Co. v. United States, 370 U.S. 294, 325-328, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). Each must be a separate line of commerce, since fabrics are used in the interior of cars for trim, upholstery and seat covers, while finishes are used

on the exterior of the cars. Each is part of commerce for purposes of the Sherman Act.[16]

The relevant market is the automotive industry, which is a substantial market. The range of annual production of cars was between 4,258,000 and 7,920,000 during the years in question. General Motors' share of that market was substantial, varying between 41% and 52.7%. Du Pont's share of General Motors' purchases of automotive fabrics and finishes was substantial.[17] It averaged 21% for fabrics and 74% for finishes.

[8] In order to establish a restraint of trade in violation of § 1 or a monopolization in violation of § 2, plaintiffs must at least show that du Pont, by virtue of its stock ownership, entrenched itself as a supplier to General Motors of automotive fabrics and finishes, so that a competitor of du Pont could not have captured any of the business by offering equal price, quality and service. Cf. International Salt Co. v. United States, 332 U.S. 392, 396-397, 68 S.Ct. 12, 92 L.Ed. 20 (1947).

[9, 10] Plaintiffs' right to succeed on the issue of liability does not ripen solely on proving the public injury of restraint or monopolization. This is a private suit and plaintiffs must also prove injury to General Motors flowing from antitrust violations. § 4 of the Clayton Act (15 U.S.C. § 15).

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[16] In United States v. Grinnell Corp., 384 U.S. 563, 573, 86 S.Ct. 1698, 1705, 16 L.Ed.2d 778 (1966), the Court said that there is "no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act."

[17] The definitions of automotive fabrics and finishes as agreed upon by the parties are limited to passenger cars. This is a much more restrictive use of the terms than in the Government suit, and makes some of the statistical data in the latter unusable here.

Alleged Historical Patterns of Control

Plaintiffs contend they proved that general patterns of control by du Pont of the purchasing practices of General Motors were established in the 1920s and continued during the years involved in this litigation. This proof, with few exceptions, does not deal specifically with automotive fabrics and finishes.

A. Plaintiffs maintain that du Pont directed purchasing practices of General Motors.

An examination of the operational structure of General Motors indicates [370] that such direction would have been difficult, and in fact did not exist. Sloan's organizational plan called for decentralization of authority in the field of operations. Cadillac, Buick, Chevrolet, Olds (later Oldsmobile), Oakland (later Pontiac) and Fisher body were independent operating divisions of General Motors and were headed by general managers. A general manager had the authority and responsibility of a chief executive of an independent corporation. He was judged by the results achieved. The policy of decentralization was carried down through each division, giving subordinates who headed up an operation broad responsibility along with the authority necessary to carry out that responsibility. This plan of organization existed through the period with which we are concerned.

If du Pont exercised such control as claimed by the plaintiffs, its level of success in selling to General Motors should have exceeded by far what the evidence shows in this case. This would be especially true in those years when antitrust implications of a relationship did not receive the attention that they do today.

The record contains many instances which support just the opposite of plaintiffs' proposition, and sustain the

independence of each General Motors operating division. Here are a few examples.

Plaintiffs' witness, John F. McWhorter, the assistant to the technical director at the Inland Division of General Motors, bought paint from du Pont, but without pressure being brought on him as to where he should purchase the material. He only approved the product after testing it. On the other hand, Maurice J. Gordon, another of plaintiffs' witnesses, supplied McWhorter with a paint manufactured by Forbes Varnish Company for use on running boards, which McWhorter found superior to du Pont's paint and less expensive. McWhorter gave Forbes the bulk of this business. Gordon was also successful in supplying paint for steering wheels and motor mounts at Inland and coating for ice cube trays at the Frigidaire Division of General Motors.

For years du Pont could not sell its coated fabric for diaphragms for fuel pumps to General Motors' AC Spark Plug Division. Du Pont did sell this fabric to Carter Carburetor Company, which was so successful in using the material that it took business away from AC Spark Plug at Ford and Chrysler. Finally, in 1958 A.C. Spark Plug began to purchase the material.

General Motors' Delco-Remy Division, located in Indiana, bought most of its paint requirements from du Pont's competitors whose plants were nearby. The Harrison Radiator Division of General Motors bought all of its paint requirements from competitors of du Pont.

Du Pont manufactured materials other than fabrics and finishes which were sold to the automotive industry. It was unable to sell Fisher Body more than 3% of Fisher's million dollar requirements for weather stripping cement. Other du Pont materials included antifreeze, plastics, electrochemicals, rubber chemicals and neoprene. The record

shows that du Pont's success or lack of success in selling these products to General Motors from 1930 on reflects the independence exercised by each of the divisions of General Motors in their engineering and purchasing policies and practices.

Plaintiffs rely heavily on the fact that General Motors was du Pont's prime customer for both fabrics and finishes, far exceeding the volume of business du Pont received from Ford and Chrysler, the other two large manufacturers of automobiles. The details of this relationship will be discussed later on in this opinion. But it may be useful here to explain du Pont's comparatively minimal relationships with Ford and Chrysler.

Near the end of the 1930s, Henry Ford issued instructions that Ford was not to purchase material from du Pont, and as a result du Pont lost undercoat and topcoat enamel business to competitors. In 1945 Henry Ford II rescinded **[371]** these instructions and du Pont began to sell topcoat enamels to Ford. Ford manufactures most of its own requirements in the finishes field. When du Pont developed Dulux 100, it had some success in selling to Ford, but when the latter developed a similar enamel of its own, the volume of du Pont's sales to Ford decreased as the latter's own plant furnished the bulk of its requirements.

As for Chrysler, it took the position in the early 1930s that its best interests would be served if it could find a supplier to whom it would be the principal customer. For many years Ditzler supplied the majority of Chrysler's requirements in finishes, and was succeeded in this position by Cook Paint & Varnish Company.

B. Plaintiffs contend that monetary rewards were used to pressure operational decisions favorable to du Pont.

In 1923 General Motors had a cash bonus plan in operation for its employees, which continues today. Recommendations for recipients of a bonus were made to Sloan by the heads of various divisions. Sloan made the final selections with approval of the Finance Committee until 1937, and after that with approval of the Bonus and Salary Committee. Even though a majority of the members of both committees were du Pont nominees through 1946,[18] they always accepted Sloan's selections. This was due to the fact that the members of the respective committees were not in a position to evaluate the contributions of the thousands of employees who received bonuses each year.

In 1923 the Managers Securities Plan was adopted. It provided for the purchase of General Motors stock by top management personnel. The plan was formulated at the instance and with the aid of du Pont. Its purpose was that of all corporate incentive plans for management—to attract and hold able employees and add to their interest in making the business a successful one.

The plan provided for du Pont to form a corporation known as General Motors Securities Company, whose sole asset was the 7,500,000 shares of General Motors owned by du Pont. General Motors formed a corporation known as Managers Securities Company. The latter purchased 30% of the shares of General Motors Securities Company, which represented 2,250,000 shares of General Motors stock. This was about the amount of stock that du Pont had purchased in 1920 as the result of Durant's financial predicament. The purchase price was the then market price of the General Motors stock. Payment was spread over a number of years and was guaranteed by General Motors. Voting rights in the 2,250,000 shares of General Motors stock were retained by du Pont during the plan's operation.

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[18] After 1946 du Pont nominees were in the minority.

The Board of Directors of General Motors appointed three of its members to a special committee for the purpose of selecting the personnel who would participate in the plan. Only one of the three was a du Pont representative. The original selections were reviewed with Sloan and his recommended changes were accepted by the committee. A person selected to participate paid for his stock in Managers Securities Company (the purchase price being keyed to the current market price of General Motors stock) by (1) making a 15% down payment in cash, (2) crediting his allotment from the general bonus plan, and (3) being credited with the dividends received by General Motors Securities Company on the General Motors stock. Some 97 executives were chosen for participation, the last in 1926, and the plan expired in 1930. Its dissolution covered the period 1930-1938.

From hindsight this turned out to be a fabulous investment for the selectees who accepted the offer to participate and held on to their stock, but at the time of its inception it had the risk of any investment. After all, only three years before (1920) General Motors was in dire **[372]** straits and this could have happened again.

The Managers Securities Plan was succeeded by the General Motors Management Corporation Plan, which operated from 1930 through 1936 and was "under water" in the middle of its operation. The stock for the operation of this plan was not purchased from du Pont, but was acquired from General Motors. From 1937 on, top management received rewards solely under the general bonus plan, which did not have a stock purchase feature.

There is no evidence that any of the plans were used to influence General Motors personnel in their business relationships with du Pont or that they were so influenced.

C. Plaintiffs claim that General Motors personnel who were formerly connected with du Pont dictated General Motors' policy in favor of du Pont.

When du Pont originally purchased General Motors stock, it arranged for J. A. Haskell to be its liaison man with General Motors. He became a vice president, director and member of the Executive and Finance Committees of General Motors while maintaining his position as a vice president and director of du Pont. He died in 1923. Haskell made several efforts to be helpful to du Pont in selling products to General Motors, but there is no proof that he was successful. For example, when he inquired of Oakland as to why it did not buy from du Pont, he was told that du Pont's prices were too high.

As indicated above, Pierre du Pont, in the period 1920-1923, was president and chairman of the board of General Motors, and at the same time he was chairman of the board of du Pont. In 1921 he obtained from du Pont its records as to sales of products to General Motors, which showed that Olds was purchasing only part of its Fabrikoid requirements from du Pont, that Cadillac and Oakland were purchasing only part of their paint and varnish requirements from du Pont, and that Fisher Body did not purchase any of its paint and varnish requirements from du Pont. He observed, in a letter to Lammot du Pont, vice president of du Pont, that:

> "With the change in management at Cadillac, Oakland and Olds, I believe you should be able to sell substantially all of the paint, varnish and fabrikoid products needed; especially is this true of Cadillac.
>
> "A drive should be made for Fisher Body business. Is there any reason why they have not dealt with us [du Pont]?"

It is not evident from the record whether Pierre du Pont attempted to influence the purchases by Cadillac, Olds and Oakland or merely hoped that the changes in management would bring about a happy result. Parenthetically, it should be noted that the changes in management did not result from any desire to benefit du Pont. The men who left Cadillac, Olds and Oakland did so for reasons completely unconnected with the change in the top management of General Motors. Their replacements were longtime employees of General Motors who were selected by Sloan on the basis of merit.

The record shows that in 1923 Lammot du Pont made direct appeals to Cadillac to use du Pont paint products manufactured at the Flint plant. Cadillac, while expressing a desire to use the Flint products, maintained its position that "we feel we should go most cautiously in any change in paint, adopting new things only after long trial." The answer from du Pont says, "we will look forward to a time when the Flint products have proved their value to you." Cadillac continued to purchase most of its paint and varnish requirements from other sources until 1926 when it started to use lacquer finishes on its cars, and purchased Duco, a du Pont product which was only in an experimental stage in 1923. I will discuss Duco later in this opinion. However, in 1927 Cadillac and Olds began to purchase the major portion of their lacquer requirements from paint manufacturers other than du Pont.

Oakland increased its volume of purchases from du Pont in 1924 only because **[373]** it decided to try Duco in an effort to bolster lagging sales of its automobile. The decision had no relation to any efforts on the part of du Pont to obtain the business because of the relationship between the companies.

As for Fisher Body, arrangements had been made in 1921 for Fisher to test du Pont's paints and varnishes.

In October 1922 Lammot du Pont wrote directly to Fred Fisher, president of Fisher Body, complaining that the Flint plant was not getting any substantial amount of business in paints or varnish from Fisher. He stated that in view of the stock ownership relationship between the companies Flint "should enjoy a large part, if not all, of Fisher Body's paint and varnish business, unless there is some good reason for not having it." Fisher did not reply to this letter and a second letter was written suggesting a conference. This letter also went unanswered and a telegram was sent suggesting a meeting during the auto show in New York. This was followed the next day by another telegram suggesting a definite meeting before the General Motors directors' meeting the following Monday. The meeting took place, but it does not appear to have effected any change in Fisher's purchases from du Pont until Fisher, too, turned to Duco as a finish for bodies in 1925.

John Pratt and James Lynah had been with du Pont for a number of years before going to General Motors. While Pratt could be considered du Pont oriented, and at times he attempted to be helpful to du Pont with people in the various General Motors divisions (sometimes successfully, sometimes not), the testimony shows that his first allegiance was to General Motors.[19] For example, he advised du Pont that it could create better relations with General Motors' purchasing agents if it voluntarily reduced prices whenever it could rather than have the purchaser force a reduction. On the other hand, he advised

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[19] In attempting to help du Pont sell paint to Delco-Light Company, a subsidiary of General Motors, Pratt urged that du Pont receive a major share of requirements if quality, price and service were equal to that of other suppliers. He cautioned, however, that a second supplier also be used in order to maintain a competitive situation. In this instance du Pont ultimately received the business because its price was lower.

the Canadian Division of General Motors to purchase finishes from sources of supply that would undersell du Pont in Canada. In that letter Pratt referred to giving thinner business to a competitor of du Pont "as a disciplinary measure to bring down the price of Duco and thinner." Finally, he opposed the proposal made in 1926 that General Motors furnish its production schedules to du Pont. He wrote:

> "[T]he DuPont organization will be a better organization for us to do business with when they realize they must stand on their own and expect to get business and hold same from General Motors Corporation on the same basis that we try to treat all of our suppliers—three considerations—namely, quality, service and price."

As for Lynah, his experience as an employee of du Pont was not a happy one and he resigned his position there as the result of what he considered unfair treatment. His attitude while with General Motors was that of complete loyalty to the interests of his employer.

Finally, the great majority of instances relied on by plaintiffs to show that influence was exercised on behalf of du Pont occurred prior to 1924 while Pierre du Pont was president of General Motors.

D. Plaintiffs claim that the "two sources of supply" policy froze du Pont's share of the General Motors market.

In 1923 each division of General Motors began to develop two sources of supply for all essential materials used by the division. With the increased production of automobiles, sound business judgment dictated that supplies in sufficient quantities always be available without the inherent risks of reliance on a single supplier. This policy

applied to all pur **[374]** chases made by General Motors. In the fabric field, for example, du Pont had been furnishing all of General Motors' requirements of leather substitute and rubber-coated fabrics, and General Motors was satisfied with the quality and extraordinary service which du Pont had provided. The General Motors people agreed that their divisions "should purchase 20% of their leather substitute and top materials from one of [du Pont's] competitors, leaving [du Pont] 80% of their consumption at prices which would be determined by competition." Shortly thereafter the General Purchasing Committee of General Motors (which will be discussed below) raised the amount of fabrics business that should be placed with sources other than du Pont to 25%.

In addition to the inherent risks of reliance on a single supplier, General Motors desired to dispel any belief on the part of du Pont's competitors that no matter what price they quoted they would not receive any business from General Motors. The "two sources of supply" policy enabled a competitive pricing situation to develop which would redound to General Motors' advantage.

Du Pont complained, in a letter to Pierre du Pont, as president of General Motors, that for the last six months of 1923 it lost 25% of the Chevrolet top business. Pierre du Pont replied that he disagreed with the "two sources of supply" concept. He wrote:

> "I think the duPont Company indulges in this foolish practice, as well as General Motors. At any rate I do not think it advisable to interfere in any case unless the Executive Committee of the company outlines a policy advocating one source of supply generally where such course seems advisable.
>
> "As to the policy of General Motors, I cannot refuse permission to Mr. Knudson if he wishes to divide his

> orders for Fabrikoid. I do not approve of the policy or of this particular act."

Initially the "two sources of supply" policy reduced du Pont's share of the General Motors market for its products. Thereafter it did not operate as a freeze of the reduced percentage, nor was it intended to do so.

E. Plaintiffs contend that the General Purchasing Committee of General Motors was used as an instrument to assure du Pont of General Motors' business.

Sloan created the General Purchasing Committee in December 1922 and it lasted until 1931. While he was the advocate of decentralization of the activities of the corporation, he also realized that the corporation's huge purchasing power could be used to advantage in obtaining lower prices for materials. It could also result in standardization of parts. He wrote to the person charged with developing a plan of operation:

> "It was not my idea that we would in any sense centralize purchasing. As a matter of fact it is not my idea to centralize anything * * * What I am for * * * is that everything should be done to capitalize to the benefit of the stockholders every advantage that lies to General Motors on account of the magnitude of its operations."

The committee was selected by Sloan, who became its first chairman, serving until December 1924. The members were operating personnel from various divisions along with Pratt and Lynah, who was secretary of the committee. The committee stated that its object was

> "to so co-ordinate the total purchasing power of the Corporation that the most logical and economic condition will result and the benefits of concentrated pur-

> chasing be realized without destroying in any real sense the effectiveness or merit of any individual purchasing unit."

In order to achieve the goals of the committee, contracts had to cover items required by more than one division and result in substantial savings. Specifications of an item were standardized after consultation with the divisions, and the latter could suggest suppliers who should be invited to bid on the item. After a general contract was made, the divisions were required to participate in it unless exempted. If an exemption was request [375] ed by a division, it was usually granted by the committee.

The first general contract with du Pont was entered into about two years after the formation of the committee and was numbered 148. About six months later came the second du Pont contract, numbered 198. During the life of the committee, out of 709 general contracts entered into, 14 were with du Pont and 30 with competitors of du Pont. 342 requests for general contracts were rejected, 13 of which involved du Pont.

General Motors refused to change its purchasing practice of requiring du Pont to fill orders as they were placed, without any advance estimates as to what General Motors' requirements would be. This practice put the risk of a sudden slump in the motor industry on du Pont, which could be left with a large unsold inventory. General Motors knew that every one of its suppliers assumed this risk when taking on a General Motors contract, and it believed that du Pont should not be treated differently.

Du Pont was also advised at this time that it was to make its best price in the initial offer and not to count on the opportunity to meet competitive prices, "and that on the basis of competitive prices the Divisions were free to place their business to the best advantage."

The evidence does not sustain any finding that the General Purchasing Committee either protected any existing relationship with du Pont regarding purchases of the latter's products, or was used to further du Pont's interest in selling to General Motors. Du Pont received the same treatment as any other supplier. The committee operated as initially conceived, to capitalize to the utmost on potential savings to General Motors. It was independent and free of any influence by reason of du Pont's stockholdings in General Motors or membership on its Board of Directors or its committees.

[11] In summary, no patterns of control by du Pont over purchases by General Motors had evolved in the period prior to 1950. We now turn to the specific product lines in this case, with particular reference to General Motors' purchases in the relevant time period.

Finishes

Automotive finishes on this trial have been defined by counsel as referring only to those used on passenger cars. They consist of topcoats, undercoats and thinners. Topcoats are principally nitrocellulose lacquers, acrylic lacquers and alkyd resin enamels. Du Pont manufactured nitrocellulose lacquer under the trade name "Duco," acrylic lacquer under the trade name "Lucite," and alkyd enamel under the trade names "Dulux" and "Dulux 100." Undercoats are primers, sealers, surfacers and primer-surfacers. Thinners are clear liquid solvents that are used for reducing various finishes to proper working consistency. Other manufacturers produced the same types of finishes.

In the early years varnish was used as a topcoat to finish cars, but the industry was plagued with problems inherent in using this finish. It took three to four weeks to apply and dry, with the resulting need for huge storage areas. One of the Fisher brothers said at the time that

if the problem was not solved the whole state of Michigan would have to be used to store cars. The time factor caused capital to be tied up in inventory. When a car was sold, the purchaser was fortunate if the finish lasted a year.

In 1920 du Pont developed Duco, the nitrocellulose or pyroxylin based lacquer which was considerably quicker drying and more durable than varnish. The new paint made possible the use of a wide range of colors.[20] At about this time General Motors had a committee working on the problem of developing a quick-drying paint. It approached du Pont and other paint manufacturers for help. It engaged in continuous testing of the materials. Edmund M. Flaherty and Richard C. Williams, du Pont employees, [376] worked with the General Motors people. Flaherty was the inventor of Duco and was in charge of its commercial exploitation. Sloan told Flaherty that he was aware of Duco's possibilities, but that Flaherty would have to convince the heads of the car divisions, since they would be the persons to make the final decision.

While du Pont continued extensive experimentation to improve Duco, General Motors worked on methods for its application as a topcoat. In 1923 Oakland was in a bad financial situation and decided to use Duco on its 1924 model in an attempt to enhance its sales. The use of Duco as a finish proved to be a success which included an impressive reduction in drying time—from four weeks to four hours. Each General Motors division head by independent consideration of the merits of Duco arrived at his own decision to use the product. Buick tested it extensively before adopting it as a finish in 1925. Cadillac advised a go-slow approach in using a new method of

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[20] Up to that time black was the usual color of a car finish. Ford said you could use any color "as long as it was black."

painting "before it had been tried out in every conceivable fashion." By 1926 Cadillac and the other divisions were using Duco.

General Motors was so interested in Duco that it wrote to du Pont requesting "that all negotiations with other possible consumers be stopped and also the plans for selling these products on the open market" until the two parties could determine whether General Motors could obtain the entire output. The letter concluded with the statement that, "The importance of this subject is so great as to warrant the careful attention of your best men until proper arrangements are made." Du Pont replied that it was embarrassed by such a request since rumors were spreading about the value of the product. If it refused sales to other customers, they might retaliate by refusing to buy du Pont products. In addition, du Pont knew that a similar product was being developed by competitors who might be able to fill the demand, thereby creating future selling problems for du Pont. In 1925 every car manufacturer except Ford and Chrysler was using Duco, and several years later Chrysler also joined the list for a time. The testimony overwhelmingly supports the conclusion that the initial decisions by the General Motors divisions to use Duco were wise ones.

While the several car divisions were in the transitory period of change-over to Duco, the General Motors General Purchasing Committee continually sought other possible sources of supply of lacquer topcoats. These sources were developed by the late 1920s and became the primary suppliers to Cadillac, Oldsmobile and Fisher.

For several years after 1926 all major car manufacturers except Ford continued to use Duco as a topcoat. In addition to General Motors, the list included Hupmobile, Cleveland, Chalmers, Franklin, Harmon, Chrysler, Nash and Moon. Over the years competition forced many of

these manufacturers out of business. Chrysler eventually joined Ford in using enamels. In 1953 Duco was still being sold to Packard, Hudson and Crosley, in addition to divisions of General Motors. However, Cadillac and Oldsmobile purchased most of their lacquer requirements from other paint manufacturers.

Du Pont continued its research to make improvements in Duco both as to durability and range of colors. After World War II it concentrated on developing a new paint product, since it was of the opinion that Duco had reached its limit in scientific development. The new paint was an acrylic lacquer which du Pont called Lucite. After extensive testing General Motors started to use Lucite experimentally in 1955 and by 1958 all of its divisions had switched to acrylic lacquer. During the period in which Lucite was being tested, General Motors advised du Pont that it would use the product only if alternate sources of supply could be developed, and if necessary du Pont would have to license other manufacturers to create such sources.

In the period covered by this action, the three largest manfacturers of automobiles were General Motors, Ford and [377] Chrysler. General Motors used Duco and then Lucite, which were lacquers, while Ford and Chrysler used enamel.

Since plaintiffs claim that General Motors purchased lacquers because of du Pont control, it is necessary to compare the relative merits of each finish. This is also important in view of the fact that du Pont manufactured and sold topcoat enamel at a price of about a dollar a gallon less than lacquer in the early 1950s, and at a price of about 75 cents a gallon less than lacquer in the late 1950s.

General Motors observed the relative merits of each product, since Chevrolet used lacquer on its passenger cars and enamel on its trucks. Plaintiffs did not produce either a paint manufacturer or an automobile manufacturer to testify as to their opinions. There were several large paint manufacturers who produced finishes and did not sell them to General Motors. As stated, Chrysler and Ford used enamel. The only credible evidence adduced on this trial as to the comparative advantages of using lacquer instead of enamel on passenger cars came from defendants' witnesses.

Enamel had a higher initial gloss than lacquer. Thus it was not necessary for a car finished in enamel to be rubbed on the assembly line, a procedure necessary for a lacquer finish. Ovens capable of producing high temperatures were needed to create the hard protective film of an enamel finish. Enamel finishes were more prone to chipping on the assembly line. The repair of chipped enamel finishes before the cars left the factory required separate facilities and expensive application, while chipped lacquer finishes could be spot repaired on the assembly line. Enamels generally were as durable as lacquers except in certain colors and in the medium and light metallic colors. Metallic colors were created by the use of aluminum in the paint.

Lacquers provided a broader range of colors than enamels. This occurred because greater dispersion of the pigment could be obtained in nitrocellulose. Greater transparency was also achieved, providing unique color effects, especially in the metallic colors which became very popular in the late 1950s. Lacquers did not have the "orange peel" effect found in enamels and gave a smoother appear-

ance than enamels.[21] If a lacquer finish was polished after aging, the gloss returned to a much higher degree than possible in an enamel finish. Lacquers weathered better than enamels and thus were more attractive in the used car market and to the owner who operated his car for many years. The repair of a damaged finish was less expensive for the owner of a lacquer finished car than for the owner of an enamel finished car.

Lucite proved even more durable than Duco, provided a higher gloss than Duco or even the most advanced enamel, and made possible an even wider variety of colors.

Eye appeal is a part of styling which is so important in the sale of a car. General Motors highlighted the superior appearance of Lucite and the ease of upkeep by referring to "Magic Mirror" finish in its advertising. For several years this finish commanded a premium price if ordered by a customer.[22]

It was argued on the trial that if lacquer was superior to enamel the car manufacturers using enamel would have switched to lacquer. However, once a car manufacturer had adopted enamel as a topcoat, it was loathe to convert to lacquer because of the large capital investment needed to make the necessary changes. Conversion would require changes in the physical setup and space requirements of the production line, scrapping of existing machinery and installing new equipment, and the use of **[378]** different methods in the application of the finish.

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[21] Blushing (cloudy appearance on the finished surface), chalking (appearance of pigment on the surface), and flooding (irregular distribution of the pigment within the surface of the film, giving a mottled appearance) were more of a problem with enamels than with lacquers.

[22] See n. 24 infra.

The testimony shows that it is difficult to determine the over-all cost of finishing a car in lacquer as opposed to finishing a car in enamel. A gallon of lacquer sold at a higher price than a gallon of enamel—color for color. This differential narrowed during the relevant period because of an increase in the price of enamel. However, the per gallon cost of the topcoat is only one factor in the problem. The material cost of Lucite per car may be reduced because less gallonage is needed than when enamel or Duco is used.[23] The cost of application of enamel may be higher. Repairing an enamel finish on the production line is more difficult and expensive. In 1958 the list price of a Chevrolet ranged from $1,824 to $2,587. The cost of the materials to finish that car in Lucite was $14.80. The saving, if enamel were used, would have been minuscule and not warranted when weighed against the advantages of lacquer's color, styling, durability and lower repair costs.

From all of the evidence, it was General Motors' considered business judgment, well substantiated by the record here, that lacquer was superior to enamel as a topcoat for passenger cars. This business judgment was not affected either directly or indirectly by du Pont's stock ownership in General Motors.

Plaintiffs claim that the volume of General Motors' purchases of finishes from du Point resulted from the exercise of control by du Pont. General Motors used, in the main, only three sources of supply for finishes. A supplier was

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[23] The solids content of Lucite in a particular color was in most cases higher than the solids content of Duco in the same color. Thus a gallon of Lucite would go further than a gallon of Duco. For example, if Pontiac's purchases of Duco were translated into purchases of Lucite, 90 gallons would do the job calling for 100 gallons of Duco, and the resulting total cost of the material to Pontiac would be about the same. Had Chevrolet's 1957 purchases of Duco been purchases of Lucite, the cost per car for the topcoat material would have increased by $1.

qualified if it had a proven record of reliability in meeting delivery schedules and its product was consistent in quality. The qualified suppliers for topcoats and undercoats were du Pont, Rinshed-Mason and Forbes. The qualified suppliers for thinners were du Pont, Grow Solvent and one or two others.

The nature of the product has a great deal to do with lining up additional sources of supply. The most delicate job in the automobile industry is painting the cars and paint is an extremely volatile product. Great reliance must be placed on the research and development that has gone into a particular paint, the uniform quality of the paint, the resources and skill of the supplier, and his ability to deliver large quantities on time.

In line with the decentralized system of operation in General Motors, each car division consisted of four main departments—engineering, purchasing, manufacturing and sales. The engineering and manufacturing departments tested and determined the standards of materials that were to be used. The paint director was a member of the engineering department. The purchasing department procured the materials that were approved after testing.

The first step in the purchase of topcoats was the determination of the range of colors that was to be used for a model year. A particular color could originate within the General Motors organization or could be submitted by a supplier. After the number of colors to be used was determined, the next step was to send them to the engineering department. The latter then requested a qualified supplier to submit a sample for testing or it tested a sample which was proffered by a supplier.

If the sample passed the extensive tests for application, workability, durability etc., the source was approved. Chips painted with the approved topcoat were submitted to

other qualified suppliers for [379] matching. If their samples passed the tests, they too were placed on the source sheet. The source sheets were sent to the purchasing department and were called engineering releases.

The cost estimators in the purchasing department requested quotations simultaneously from the qualified suppliers listed in the engineering release. When the requests for quotations were returned with the prices indicated next to the various colors, they were transferred to a worksheet to show how each supplier's price related to the other prices. If necessary, negotiations were conducted to obtain competitive prices. The purchasing department did not know and was not interested in the profit margins obtained by a supplier. It was solely interested in competitive prices, which in the case of topcoats meant differentials of no more than 10 cents per gallon. About two and a quarter gallons of topcoats were needed to finish a car.

The purchasing department then determined the allocation of its requirements to each supplier. The orders given were sufficiently large, so that the supplier could handle them on a competitive basis. Allocations would depend on the proximity of the supplier's location to the particular plant of a car division, the desire to make sure of a match between the paint put on the body by Fisher and that placed on the hood and other parts by the assembling division, the supplier's service available to the division's plant, and the productive capacity of the supplier. Assembly line production requires quick service if problems arise with paints and a continuous flow of supply. Sloan testified that, of the three elements of competition in purchasing materials in the automobile industry, service and quality were more important than price.

Any paint manufacturer who wished to quote on this business could do so. The Cook Company did so, but its price was too high. The Acme Division of the Sherwin-

Williams Company, reputedly one of the large paint manufacturers in the country, obtained some topcoat business from General Motors, but was dropped as a source of supply because the quality of its product did not measure up to General Motors' standards. Jones-Dabney submitted samples which had unusual effects, but did not stand up in the testing laboratory. It appears that, of all the paint manufacturers who submitted samples to General Motors, du Pont was the most proficient in doing color work. Du Pont offered innovations in coloring and could produce requested items in a short space of time. They were most successful in passing production tests conducted by General Motors' laboratories.

No evidence was adduced that any competitive source was foreclosed from obtaining finish business from General Motors or that any competitor could have supplied finishes of the same quality and description, and with comparable service, at a price lower than that paid by General Motors to du Pont. There is no evidence that du Pont, directly or indirectly, influenced the decisions made in any of the steps involved in the purchases of finishes.

Plaintiffs have laid great emphasis on the volume of topcoat business given to du Pont, but it must be remembered that their claim relates to finishes, which include undercoats and thinners in addition to topcoats. In 1951 du Pont furnished 81% of General Motors' over-all requirements of finishes. This steadily decreased to 63% in 1959. Fisher Body was the largest buyer of finishes among the General Motors divisions. In 1951 it purchased 68% of its requirements from du Pont and by 1959 this was down to less than 50%. If du Pont had maintained its 1951 position, it would have had additional sales of over $2,500,000 to Fisher in 1955 and over $5,000,000 in 1959.

Du Pont was not the number one supplier to all the divisions. Rinshed-Mason held that position with Oldsmobile for topcoats in 1951-1959 and succeeded to the top position with Cadillac for topcoats in 1955. Fisher purchased undercoats principally from Rinshed-Mason in 1951-1959 and Oldsmobile purchased [380] undercoats principally from Forbes during the same period. Du Pont was successful in selling thinners to General Motors until the early 1950s, when Grow Solvent began to get some of the business. By 1955 Grow's sales of thinners to Fisher amounted to $1,200,000 and in 1959 they rose to $2,322,000. The reason for the variations between the divisions is that each acted independently of the other for its own best interests.

While finishes and fabrics are separate claims in this action and each must be decided independently of the other, it is impossible to keep the proof compartmentalized. For example, the purchasing department of Fisher, the largest of the divisions of General Motors, procured both finishes and fabrics. Du Pont had relatively little success in selling fabrics to Fisher. See 381 and 382 infra. There is no reason to believe that it had any greater influence over the purchasing department in the purchases of finishes. It is fair to infer that its success in this area was based on furnishing a superior product at competitive prices.

So much for General Motors' practices and procedures in purchasing its finish requirements. Now let us consider du Pont's pricing practices in relation to the products it sold to General Motors. During 1951-1959 du Pont's sales to General Motors of automotive finishes ranged from a low of 89.2% to a high of 96.2% of its production of these items. In topcoats, both Lucite and Duco lacquers and enamel cost about the same to produce. Yet the selling price of lacquer was higher than the selling price of enamel, and the selling price of Lucite was higher than

the selling price of Duco. It is plaintiffs' contention that the selling prices of these products should have been about the same, and that because they were not and because such a great percentage of du Pont's production went to General Motors, it must be inferred that du Pont had a captive customer in General Motors.

Cost of manufacture is only one of several components in arriving at price. The main consideration is what price can be obtained in the market place, and this is governed by the value of the product to the purchaser,[24] limited by prices for competitive products of the same quality. The fact is that merchandise of the same quality and description in a product line was sold by du Pont at the same price to all its customers.

The refinishing market furnishes a further example of the propriety of du Pont's pricing policies as regards lacquer finishes. The refinishing market is composed of local shops where the owner takes his automobile to be repaired. Du Pont sold tbout one third of the requirements of this market, two thirds being sales of enamel and one third being sales of lacquer. The lacquer was sold at about

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[24] In December 1957 Harlow H. Curtice, president of General Motors, inquired as to the possibility of a reduction in the price of Lucite. C. H. Greenewalt, president of du Pont, replied that substantial economies in material cost per car finished in Lucite had been made and that in certain instances the difference was as low as 25 cents per car over Duco. In addition, he stated that current manufacturing costs on Lucite colors used on the 1958 models were being restudied and that they expected to have some reductions to pass along. The letter also pointed out that Lucite might be cheaper or more expensive than Duco, depending on color and solid content. It concludes with:

> "I must say, however, that we have to take a back seat to you when it comes to pricing policy or perhaps the answer is that if you can get people to pay the $183 extra you charge for putting a "Lucite" finish on a Cadillac, it must really be very good indeed."

$2 to $2.50 per gallon more than enamel because of consumer demand, even though both cost du Pont about the same to manufacture. The rate of profit on the sale of lacquer to the refinish market was as high as on the sales to General Motors.

[12] The court concludes that du Pont did not, by reason of its stock ownership, control the purchases by General Motors of finishes from du Pont, and it did not insulate General Motors from [381] competition in this line of commerce during the years 1950-1959. Therefore du Pont did not violate § 1 and § 2 of the Sherman Act.

Fabrics

Automotive fabrics have been defined by counsel on this trial as coated materials used for trim, upholstery and seat covers in the interior of passenger cars.[25]

Du Pont had extensive experience with nitrocellulose in the manufacture of smokeless powder. Sometime around 1910 it developed an artificial leather called Fabrikoid, which was a cloth backing coated with pyroxylin, a nitrocellulose based solution. Fabrikoid was water resistant and washable. Before du Pont purchased General Motors stock in 1917, it was a principal supplier of this material not only to divisions of General Motors, but to the entire automotive market. Artificial leather was widely used as upholstery in the open touring car which was the usual model made until the mid-1920s. In the succeeding ten years there was a gradual change-over to closed cars.

Fisher Body purchased all of General Motors' requirements of automotive fabrics for closed cars. Immediately

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[25] Upholstery refers to the material a person sits on or his back rests against. Fabric for the rest of the interior is referred to as trim.

after World War II there was a shortage of coated fabrics and Fisher purchased all that du Pont could produce. Thus in 1946 and 1947 du Pont furnished a maximum[26] of 74% and 60%, respectively, of General Motors' requirements of automotive fabrics. At about this time vinyl chloride coatings came into use and by the mid-1950s they had completely replaced pyroxylin coatings. Du Pont's product of this material was called Fabrilite. Other manufacturers produced the same type of material.

Figures are not available f. the years 1948-1954, but for the years 1955-1959 du Pont furnished a maximum of 24%, 19%, 21%, 13% and 16%, respectively, of General Motors' requirements.[27] During the years 1955-1959 du Pont sold an average of 86% of its production of automotive fabrics to General Motors. Plaintiffs contend that this fact compels the inference that du Pont controlled General Motors' purchases of fabrics.

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[26] Maximum percentages are used because purchases of fabrics from certain major suppliers could not be segregated in General Motors' books.

[27] The top three suppliers of fabrics each year to General Motors were as follows:

1955	General Tire	30.7%
	Federal Leather	26.2%
	Du Pont	24.0%
1956	General Tire	27.7%
	Federal Leather	28.1%
	Du Pont	19.0%
1957	General Tire	25.2%
	Federal Leather	21.8%
	Du Pont	21.0%
1958	General Tire	25.8%
	Federal Leather	19.7%
	Goodall	14.2%
1959	General Tire	26.4%
	Federal Leather	16.9%
	Du Pont	16.0%

86% of sales is impressive, but what that percentage was of du Pont's productive capacity is another matter. The record is barren of any light on this point for the years in question. On the other hand, if the business was as lucrative as plaintiffs try to make it appear from statistical tables, du Pont obviously would have obtained that business, or enlarged its productive capacity to do so, if it controlled General Motors' purchases of fabrics. For example, in 1955 du Pont might have received 90% or $35,701,938 of General Motors' requirements instead of 24% or $9,626,976.

[13] Plaintiffs have placed great reliance on the difference in spread between mill cost and sales price on total sales of fabrics to General Motors compared to total sales to other automobile manufacturers. The individual fabrics varied in color, finish, range of grade and specification of decorative effects by the purchaser.[28]

Prices differed depending on these variations. Plaintiffs have not shown com [382] parable purchases of fabrics of like color, finish and grade by other automobile manufacturers, and therefore the difference in spread cannot support a finding sustaining plaintiffs' contention.[29]

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[28] Du Pont invented Jeweltone, a fabric with a metallic appearance to go with the metallic effect developed in Lucite. Neither Ford nor Chrysler purchased Jeweltone. Nor did they require their fabrics to be embossed in a high temperature dielectric process, as did General Motors. Both of these procedures cost more than the usual coated fabrics, but were designated by General Motors because they were considered to be advantageous from a styling viewpoint.

[29] A similar situation exists with regard to the proof on finishes. Undercoats for lacquers were different from those for enamels. In 1956 General Motors started to use a high performance undercoat. The subsequent use of Lucite required an undercoat that was more expensive than the undercoat previously used with Duco. Similarly, thinners for lacquers were different in composition from those for enamels. In addition, a greater quantity of thinner was needed for one gallon of lacquer than for a gallon of enamel.

At this point reference must be made to du Pont's accounting system and methods of pricing the huge number of products it manufactures. Each product consists of many items of different constructions, colors or styles. It is practically impossible in a large manufacturing operation to allocate specific manufacturing or mill costs (labor, material and plant overhead) to specific items. Consequently a number of items within a product line are gathered together in a category called a cost group, which has a standard unit cost for everything manufactured in that group. A single product such as vinyl upholstery will have a number of costs groups.[30] Cost grouping is an accepted cost accounting procedure. If it were possible to break the figure down by specific items, there would be a great deal of variance in cost between the components of the group due to materials and customer specifications.

When it comes to selling a product, however, the price is not set by adding a markup to the unit price of the cost group. Rather, each order is individually processed and the quotation of price is determined by first arriving at a basic figure called a replacement cost. A number of factors are considered in calculating replacement cost. The replacement cost figure is then increased by evaluating the competitive features of the product in the market, such as quality, product use and price of comparable products. The resulting sales price is quoted to the customer. Although plaintiffs have consistently urged that there was a set markup for profit applied to replacement cost, I do not find this to be true. Profit varies depending on the factors indicated.

It is obvious from the accounting and pricing procedures followed by du Pont that profit on an item cannot be

[30] There are some 15,000 items manufactured in the fabrics and finishes department of du Pont and these items are placed in 400 cost groups.

measured by comparing sales price to cost group. This can be accomplished only by measuring sales price against replacement costs. Plaintiffs refused all offers to check the invoices and replacement cost documents available in this area.[31]

The evidence does not justify any finding of the exercise of control by du Pont over General Motors in the purchase of fabrics. On the contrary, du Pont was operating in a highly competitive field and its share of General Motors' requirements belies any such conclusion.

Fisher spent one and a half times as much on fabrics as it did on finishes. For example, in the year 1956 its purchases of fabrics amounted to $36,837,000 while its purchases of finishes amounted to $23,820,000. Du Pont obtained only 19% of Fisher's fabrics business that year, a fact which negatives any claim that du Pont exercised control in this area.

At one time du Pont was able to advance delivery dates for fabrics to Fisher [383] in order to take up the slack caused by failure of other suppliers to deliver on time. At another time du Pont, through its research and development facilities, solved a problem Fisher was having with materials furnished by another supplier. Despite instances of this character, du Pont was unable to increase the percentage which it furnished of Fisher's fabric requirements.

The purchasing procedures for fabrics were the same as those detailed for finishes, supra pp. 378 and 380. There were six or seven qualified suppliers who responded to re-

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[31] On July 28, 1961 plaintiffs were advised by Lewis A. Freeman, who subsequently testified as their accounting expert, that this data must be obtained and analyzed to meet the requirements of essential information on the issues in the lawsuit.

quests for quotations. A spread sheet was prepared listing the various items for which quotations had been requested, and the bids received were indicated alongside the item. The purchasing agents of Fisher then negotiated competitive prices before making allocations. They exercised unfettered discretion in buying the product best suited for their purposes from the standpoint of price, quality and styling appeal. The purchases were based solely on competitive merit.

[14] The court concludes that du Pont did not, by reason of its stock ownership, control the purchases by General Motors of fabrics from du Point, and it did not insulate General Motors from competition in this line of commerce during the years 1950-1959. Therefore du Point did not violate § 1 or § 2 of the Sherman Act.

Fiduciary Claims

Plaintiffs claim that du Pont, by virtue of its ownership of 23% of General Motors stock, owed a fiduciary duty to General Motors which it breached in regard to the sale of automotive fabrics and finishes to General Motors.

While this claim is based in part on the alleged violation of the federal antitrust laws, it does not arise under those laws, but rather is predicated upon an alleged breach of the common law fiduciary duty. I have already found that there has been no violation of the antitrust laws. As to the common law standard, the parties have stipulated that New York courts would find that the applicable state law is that of Delaware, the place of incorporation of General Motors. See Perlman v. Feldmann, 219 F.2d 173, 175 (2d Cir. 1955); Reese & Kaufman, The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit, 58 Colum.L.Rev. 1118, 1125 (1958). The courts have stated that the laws of Delaware and New York are substantially

the same in this area of corporate relationships. See Upson v. Otis, 155 F.2d 606, 610-611 (2d Cir. 1946); Mayer v. Adams, 37 Del.Ch. 298, 305, 141 A.2d 458, 462 (1958).

Plaintiffs rely upon what they claim to be a generally accepted principle that dominant or controlling stockholders, like directors, owe a fiduciary duty to the corporation. I have found that du Pont possessed the voting power to control General Motors. See pp. 365 and 367, supra. Beyond percentage of ownership as an indicium of control, however, some legal scholars place greater emphasis on the exercise of control rather than on the power to control. Professor Leech indicates that:

> "The 'control' of a corporation resides in that person or group of persons which in fact determines the corporation's operational and financial policies with minimum practical risk of effective reversal of policy decisions. In that sense, the subordinate corporate official who has broad discretionary authority in the particular area of corporate activity committed to him does not control that part of the corporation, so long as the ambit of his authority is in practice circumscribed by others and his decisions subject to effective review." Leech, Transactions In Corporate Control, 104 U.Pa. L.Rev. 725, n. 1 (1956).

[15] The case law supports this analysis and is not as simple as plaintiffs contend. The New York courts have frequently held that a dominant or majority stockholder does not become a fiduciary for other stockholders merely by reason of his voting power. It is only when he steps out of his role as a stockholder and **[384]** begins to usurp the functions of director in the management of corporate affairs that such a duty is imposed. Kavanaugh v. Kavanaugh Knitting Co., 226 N. Y. 185, 123 N.E. 148 (1919); Levy v. American Beverage Corp., 265 App.Div. 208, 38

N.Y.S.2d 517 (1st Dept. 1942); Blaustein v. Pan American Petroleum & Transp. Co., 263 App.Div. 97, 31 N.Y.S.2d 934 (1st Dept. 1941), aff'd, 293 N.Y. 281, 56 N.E.2d 705 (1944); Cleary v. Higley, 154 Misc. 158, 277 N.Y.S. 63 (Sup.Ct. 1934), aff'd per curiam, 246 App.Div. 698, 284 N.Y.S. 989 (1st Dept. 1935), application for leave to appeal denied, 270 N.Y. 673, 284 N.Y.S. 989 (1936). These cases have been cited with approval in Delaware. Blish v. Thompson Automatic Arms Corp., 30 Del.Ch. 538, 587, 64 A.2d 581, 606 (1948); Allied Chemical & Dye Corp. v. Steel & Tube Co. of America, 14 Del.Ch. 1, 13, 120 A. 486, 491 (1923).

The cases relied upon by plaintiffs do not depart from the requirement that more than mere power to control is necessary to incur a fiduciary duty. In Southern Pacific Co. v. Bogert, 250 U.S. 483, 39 S.Ct. 533, 63 L.Ed. 1099 (1919), the controlling stockholder was active in the affairs of the corporation. The Court, in holding that the doctrine under which majority stockholder exercising control are deemed trustees for the minority was applicable in that case, said:

> "But the doctrine by which the holders of a majority of the stock of a corporation *who dominate its affairs* are held to act as trustees for the minority does not rest upon such technical distinctions. It is *the fact of control* of the common property *held and exercised,* not the particular means by which or manner in which the control is exercised, that creates the fiduciary obligation." 250 U.S. at 492, 39 S.Ct. at 537 (emphasis added.)[32]

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[32] In Ripley v. International Rys. of Cent. Amer., 8 A.D.2d 310, 316, 188 N.Y.S.2d 62, 71 (1st Dept. 1959), aff'd, 8 N.Y.2d 430, 209 N.Y.S.2d 289, 171 N.E.2d 443 (1960), the court cited this passage in *Bogert* to support its conclusion that apart from a 42% stock ownership "control was, as a practical matter, completely effectual," and that therefore a fiduciary duty existed.

In Pepper v. Litton, 308 U.S. 295, 297, 60 S.Ct. 238, 240, 84 L.Ed. 281 (1939), the Court was dealing with a " 'one-man' or family corporation * * * of which respondent was the dominant and controlling stockholder." The Court found respondent to be a fiduciary, citing *Bogert*. It appears that the words "dominant and controlling" in *Pepper* were intended to mean actual domination through the exercise of control.

In Chelrob, Inc. v. Barrett, 293 N.Y. 442, 57 N.E.2d 825 (1944), the court recognized the doctrine that, to be considered fiduciaries, majority shareholders must usurp the functions of directors and actually use their power to dominate and control. Active influence and control was inferred in that case, since the corporate majority shareholder and the corporation whose shares it held "were operated as part of a 'system' " and "the directors acted upon the advice of experts retained by the system". 293 N.Y. at 460, 57 N.E.2d at 834.

[16, 17] It seems clear, therefore, that the mere fact of du Pont's ownership of 23% of General Motors stock and the election of several of its nominees as directors is not enough to impose a fiduciary duty upon du Pont. Nevertheless, there is some evidence which would permit an inference that even after 1923 du Pont did exert some degree of influence and control over the general business affairs of General Motors, through the membership of its designees on the Executive Committee and Policy Committee. See pp. 365, 367 supra. Whether on this record that influence was enough to impose the fiduciary duty need not be decided, since it is my conclusion that, even if there was a fiduciary duty, it was not breached in relation to the purchases of finishes and fabrics.

[18, 19] When a fiduciary is challenged for having engaged in self-dealing **[385]** the property or services of the

corporation, the fiduciary obligation results in both the burden of coming forward with evidence and the burden of persuasion being shifted to the fiduciary to demonstrate that the transactions were scrupulously fair.[33] The test is an objective one; liability of the controlling corporation hinges on the fairness of the challenged transactions.[34]

[20] To determine fairness, courts consider the market price of the goods sold if one is ascertainable,[35] whether the corporation received full value in all the commodities purchased,[36] the extent of dominance by the controlling corporation,[37] who initiated the complained of transactions[38] and more generally whether reasonable and disin-

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[33] Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 598, 41 S.Ct. 209, 65 L.Ed. 425 (1921); Cheff v. Mathes, 41 Del.Ch. 494, 504, 199 A.2d 548, 554 (1964); Kennedy v. Emerald Coal & Coke Co., 28 Del.Ch. 405, 415, 42 A.2d 398, 402 (1944); Shlensky v. South Parkway Building Corp., 19 Ill.2d 268, 280, 166 N.E.2d 793, 800 (1960); 1 Hornstein, Corporation Law & Practice § 439, at 554 (1959); 3 Fletcher, Cyclopedia Corporations § 974 (perm. ed. rev. vol. 1965); Annot., 33 A.L.R.2d 1060, 1072-73 (1954). Cf. Guth v. Loft, Inc., 23 Del.Ch. 255, 275, 5 A.2d 503, 512 (1939). See Note, The Fairness Test of Corporate Contracts With Interested Directors, 61 Harv.L.Rev. 335, 336 & n. 11 (1948).

[34] See Pepper v. Litton, 308 U.S. 295, 306-307, 60 S.Ct. 238, 84 L.Ed.2d 281 (1939) ("whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain"); Austrian v. Williams, 103 F.Supp. 64, 75 (S.D.N.Y. 1952); Ripley v. International Rys. of Cent. Amer., 8 A.D.2d 310, 318, 18 N.Y.S.2d 62, 73 (1st Dept.1959), aff'd, 8 N.Y.2d 430, 209 N.Y.S.2d 289, 171 N.E.2d 443 (1960); Wadmond Conflicts of Business Interests, 17 Bus.Lawyer 48 (1961); Farmer, Fiduciary Duty of Directors and Officers of Private Corporations, 27 Tenn.L. Rev. 284 (1960).

[35] See, e.g., Williams v. Salisbury Ice Co., 176 Md. 13, 3 A.2d 507 (1939); Moriarty v. James Butler Grocery Co., 261 App.Div. 20, 24 N.Y.S.2d 105 (1st Dept.1940).

[36] See Shlensky v. South Parkway Building Corp., 19 Ill.2d 268, 283, 166 N.E.2d 793, 801 (1960).

[37] See Austrian v. Williams, 103 F.Supp. 64, 75 (S.D.N.Y.1952).

[38] See Everett v. Phillips, 288 N.Y. 227, 43 N.E.2d 18 (1942).

terested directors would have assented to the transactions.[39]

The business relationships growing out of the sale of automotive fabrics and finishes by du Pont to General Motors were completely unrelated to the stock interest that du Pont held in General Motors. These sales and purchases resulted from arm's length transactions under competitive conditions. The prices paid by General Motors were market place prices. The quality of the products and the service that was furnished with the products were equal to if not better than what was available in the market place.

[21] I find that, even if du Pont was a fiduciary, it has carried its burden and it has not violated any fiduciary duty.

Conclusion

I have found that the defendants have neither violated §§ 1 and 2 of the Sherman Act nor breached a fiduciary duty. I also find that the plaintiffs have failed to prove the other essential element of their charge, that General Motors was injured by du Pont. There is no evidence in this voluminous record that General Motors could have purchased either finishes or fabrics on terms and conditions, including price, quality and service, more favorable than those received from du Pont. Even if plaintiffs had established substantive violations, they could have recovered nothing in the way of damages flowing from a private injury.

The above opinion shall constitute the findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52.

The first and ninth causes of action in the amended consolidated complaint are dismissed. So ordered.

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[39] See International Radio Tel. Co. v. Atlantic Communication Co. 290 F. 698, 702 (2d Cir. 1923); See also Chelrob, Inc. v. Barrett, 293 N.Y. 442, 57 N.E.2d 825 (1944).

221 F.Supp. 488

Rita GOTTESMAN, Maria Mattiello, and Paul J. Peyser, Plaintiffs,

v.

GENERAL MOTORS CORPORATION and E. I. duPont de Nemours and Company, Defendants.

United States District Court
S. D. New York
Sept. 18, 1963.

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[489] Netter & Netter, New York City General Counsel for plaintiffs; Gordon, Brady, Caffrey & Keller, O'Connor & Farber, Richard Netter, Edward A. Rothenberg, Henry L. Bayles, Abbott Gould and Jay Miller, New York City, of counsel.

Frank H. Gordon, New York City, and Daniel M. Gribbon, Washington, D. C., for defendant E. I. du Pont de Nemours & Co.; Henry P. Sailer, Alvin Friedman, Washington, D. C., Irving S. Shapiro, Wilmington, Del., and Covington & Burling, Washington, D. C., of counsel.

George A. Brooks, New York City, for defendant General Motors Corp.; Edward B. Wallace, New York City, of counsel.

[490] METZNER, District Judge.

Plaintiffs are minority stockholders of General Motors Corporation who have based this derivative action against du Pont and General Motors primarily on matters involved in the government antitrust suit against these corporations and U. S. Rubber Co. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957). The final judgment in that case, entered on March

1, 1962, dismissed without prejudice the claims alleging violations of the Sherman Act, and adjudicated that du Pont's acquisition of General Motors stock violated section 7 of the Clayton Act. In their complaint, plaintiffs have quoted at length from the above decision of the Supreme Court in the government suit, relying on section 5(a) of the Clayton Act. 15 U.S.C. § 16(a).

[1] It is the usual practice in a private Sherman Act litigation to defer a determination as to the effect to be given under section 5(a) to a prior government judgment until the deposition-discovery proceedings have been completed, and court and counsel are ready to frame the issues for trial. See, e. g., Alamo Theatre Co. v. Loew's, Inc., 143 F.Supp. 419 (N.D.Ill.1956). However, a different approach is necessary in this case in order to define the scope of deposition-discovery procedures. The complaint alleges and seeks recovery for both Sherman Act and Clayton Act violations. Since the government judgment was predicated solely on a violation of section 7 of the Clayton Act, serious questions arise as to the solace available to plaintiffs from that judgment. Section 7 condemns acts that have a reasonable *tendency to result* in violations of the Sherman Act. The latter act speaks of actual restraints and monopolies. As the Supreme Court pointed out,

> "The Clayton Act was intended to supplement the Sherman Act. * * * Its aim was primarily to arrest apprehended consequences of intercorporate relationships *before those relationships could work their evil,* which may be at or any time after the acquisition, depending upon the circumstances of the particular case." 353 U.S. at 597, 77 S.Ct. at 879, 1 L.Ed.2d 1057. (Emphasis supplied).

Therefore a ruling on the availability to these plaintiffs of the judgment in the government suit is important to

advise plaintiffs of the extent to which they must rely on independent evidence to prove their case.

Furthermore, and independent of the applicability of section 5(a), there is the question whether recovery of money damages may be had for a violation of section 7 of the Clayton Act.

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Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), provides:

> "A final judgment or decree * * * hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws * * * as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto".

The Supreme Court has held that section 5(a) adopts the general principles of collateral estoppel. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534 (1951).

> "Such estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution. * * * In the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment." 340 U.S. at 569, 71 S.Ct. at 414, 95 L.Ed. 534.

Subsequent cases have held that this rule is applicable when the government suit was a civil suit. Eagle Lion

Studios, [491] Inc. v. Loew's, Inc., 248 F.2d 438 (2d Cir. 1957), aff'd by an equally divided Court, 358 U.S. 100, 79 S.Ct. 218, 3 L.Ed. 2d 147 (1958); Webster Rosewood Corp. v. Schine Chain Theatres, Inc., 263 F.2d 533 (2d Cir.), cert. denied, 360 U.S. 912, 79 S.Ct. 1296, 3 L.Ed.2d 1261 (1959); Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709 (9th Cir. 1959), cert. denied, 361 U.S. 961, 80 S.Ct. 590, 4 L.Ed.2d 543 (1960).

Judge Learned Hand in the case of The Evergreens v. Nunan, 141 F.2d 927, 152 A.L.R. 1187 (2d Cir.), cert. denied, 323 U.S. 720, 65 S.Ct. 49, 89 L.Ed. 579 (1944), drew a distinction between ultimate facts and mediate data. Ultimate facts are those essential to the decision and "upon whose combined occurrence the law raises the duty, or the right, in question". Mediate data are facts "from whose existence may be rationally inferred the existence of one of the facts upon whose combined occurrence the law raises the duty, or the right." 141 F.2d at 928.

In Yates v. United States, 354 U.S. 298, 338, 77 S.Ct. 1064, 1087, 1 L.Ed.2d 1356 (1957), the Court held that:

> ". . . a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding. So far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative. The Evergreens v. Nunan, 141 F.2d 927, 152 A.L.R. 1187; Restatement, Judgments § 68, comment p."

Furthermore, in Eagle Lion Studios, Inc. v. Loew's, Inc., supra, the court held that inferences may not be drawn from the prior judgment since the court is circumscribed under section 5(a) by the narrow limits of the estoppel doctrine.

[2] From the above cases I conclude that only ultimate facts determined in the first suit are prima facie evidence

of ultimate facts in the second suit. While the holding in Zuckerman v. E. I. du Pont de Nemours & Co., 1955 Trade Cas. ¶ 68022 (S.D.N.Y.1955), is to the contrary, it was apparently rejected by the subsequent decision in the Eagle Lion case, supra.

II

We come then to the question of what ultimate facts were determined by the judgment in the government suit. The main thrust of the government suit was alleged violations of sections 1 and 2 of the Sherman Act by the principal corporate defendants, General Motors, du Pont, and U. S. Rubber. This is evident from the proportion of the record devoted to the Sherman Act violations and from the briefs submitted and argument both in the district court and in the Supreme Court. There was, however, an allegation in the complaint that the acquisition by du Pont of General Motors stock violated section 7 of the Clayton Act. The Supreme Court saw fit to reverse the judgment of dismissal solely on a determination that a violation of section 7 of the Clayton Act had been proven. The Court said:

> "In view of our determination of the case, we are not deciding the Government's appeal from the dismissal of the action under the Sherman Act." 353 U.S. at 588 n. 5, 77 S.Ct. at 875, 1 L.Ed.2d 1057.

The Court pointed out that section 7 makes illegal the acquisition by one corporation of stock of another corporation where the effect of such acquisition may be (1) to substantially lessen competition between the two corporations, or (2) to restrain commerce in any section or community, or (3) to tend to create a monopoly of any line of commerce. The government's complaint only alleged that

the effect of the acquisition was "to tend to create a monopoly in particular lines of commerce."

The Court held that there was, at the time of suit, reasonable probability of the creation of a monopoly in automotive fabrics and finishes.

The facts found by the Court, necessary to that judgment, were: that du Pont acquired 23 per cent of the stock **[492]** of General Motors, which acquisition was not solely for investment; that automotive finishes and fabrics constitute a substantial "relevant market" within the meaning of the Clayton Act; that General Motors' share of that market was substantial; that du Pont supplied a substantial share of that market; that du Pont used its stock interest to entrench itself as the primary supplier to General Motors of automotive fabrics and finishes.

Plaintiffs contend that the Supreme Court further found that du Pont "controlled" General Motors, and that this fact of control may be taken as prima facie evidence with respect to all their antitrust claims, not merely those involving automotive fabrics and finishes. While there is language in the opinion indicating that du Pont "controlled" General Motors, it appears only in the context of the finding that du Pont used its stock ownership as set forth above. In the instant suit plaintiffs must prove, without reliance on the government judgment as prima facie evidence, that the stock ownership was used to gain a position as primary supplier in other lines of commerce.

[3] Plaintiffs have included in their briefs several quotations from the first and second decisions of the Supreme Court, and from Judge LaBuy's opinion of March 1, 1962, which they contend constitute findings of fact that are prima facie evidence in their favor in this litigation. However, statements of the Supreme Court that do not constitute facts *necessary* to its decision are not to be

taken as facts prima facie determined in the private suit. Furthermore, the only time any question of liability was before the Court was on the first appeal. Thus language of the Court on the second appeal in 1961, and Judge LaBuy's opinion in connection with the final judgment entered on March 1, 1962, cannot constitute findings of fact on which a determination of liability was based in 1957.

Plaintiffs strongly urge that the Supreme Court found actual restraints of trade, and that the fact of such restraints is prima facie established for the instant case. The opinions of the Court do speak of restraint and monopoly, but only with regard to the finding of a Clayton Act violation. Specifically, the Court answered in the affirmative the question

> "whether du Pont's commanding position as General Motors' supplier of automotive finishes and fabrics was achieved * * * because its acquisition of the General Motors' stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce." 353 U.S. at 588-589, 77 S.Ct. at 875, 1 L.Ed.2d 1057.

Plaintiffs rely heavily on the use of the word "insulation" in this quotation. However, the significance of this word is limited by the context in which it appears, that is, from it the Court concluded that a monopoly was likely to result. The Court did not find from such "insulation" that actual restraint of trade or monopolization had yet occurred.

If the Court had found actual restraint or monopoly, it would have been a simple matter to have reversed the en-

tire judgment and afforded relief under the Sherman Act. However, the Court was specific in refusing to review the dismissal of the Sherman Act claims. Therefore I conclude that no reference in the Court's opinion to restraint and monopoly can be used to support plaintiffs' claims in this suit.

[4-6] It seems too obvious to require discussion that facts on which a finding of a violation of the Clayton Act is based are insufficient to support a finding of a violation of the Sherman Act, since the Clayton Act was intended to catch potential Sherman Act violations in their incipiency. "Incipiency" denotes "any time when the acquisition threatens to ripen into a prohibited effect." United States v. E. I. du Pont de Nemours & Co., supra, 353 U.S. at 597, 77 S.Ct. at 879, 1 LEd2d 1057.

[493] III

We come now to the question of what use plaintiffs may make of these ultimate facts.

Plaintiffs have alleged eight antitrust claims, each charging du Pont with having violated sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. The prayer for relief demands treble damages and an injunction. Insofar as the Clayton Act is concerned, the injunctive relief sought has already been granted in the government suit. There remains, therefore, only the possibility of the recovery of damages.

[7, 8] No case has been found discussing the question whether damages can be recovered for a violation of section 7 of the Clayton Act, and no case has been found where damages have been awarded for such a violation. The cases of Kogan v. Schenley Industries, Inc., 20 F.R.D. 4 (D.Del.1956), and Ozdoba v. Verney Brunswick Mills, Inc.,

152 F.Supp. 136 (S.D.N.Y.1946), are not in point. In the Kogan case the court was concerned solely with the question whether a minority stockholder could maintain a derivative suit for an antitrust violation. In the Ozdoba case it is not clear that damages were requested for the alleged section 7 violations, since the action was described by the court as one for treble damages and an injunction for alleged violations of the Sherman and Clayton Acts, and in any event the court did not discuss the problem. The test of a section 7 violation is whether "there is a reasonable probability that the acquisition is likely to result in the condemned restraints." United States v. E. I. du Pont de Nemours & Co., supra, 353 U.S. at 607, 77 S.Ct. at 884, 1 L.Ed.2d 1057. Plaintiffs cannot be damaged by a *potential* restraint of trade or monopolization. There can be no claim for money damages for a violation of section 7.

IV

[9] We come next to the Sherman Act claims in this complaint. Here plaintiffs are met with the well-settled rule that a decree is an estoppel only as to the time with which it dealt. International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449 (1st Cir. 1963); Webster Rosewood Corp. v. Schine Chain Theatres, Inc., supra; Park Neponset Corp. v. Smith, 258 F.2d 452 (1st Cir. 1958); Orbo Theatre Corp. v. Loew's, Inc., 156 F.Supp. 770 (D.D.C. 1957), aff'd per curiam, 104 U.S.App.D.C. 262, 261 F.2d 380 (1958), cert. denied, 359 U.S. 943, 79 S.Ct. 725, 3 L.Ed.2d 677 (1959); Basle Theatres, Inc. v. Warner Bros. Pictures Distrib. Corp., 168 F.Supp. 553 (W.D.Pa. 1958); see Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541, 74 S.Ct. 257, 98 L.Ed. 273 (1954); cf. Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc., 203 F.2d 676, 678 (2d Cir. 1953).

[10] The judgment in the government case dealt with the situation as of June 1949. It has already been held that the present plaintiffs may only recover damages for acts occurring after May 4th, 1950. Since plaintiffs are concerned with a different time period, the government judgment is not available to them.

Plaintiffs contend that there is a presumption of continuance of unlawful conduct, on which they may rely to establish that du Pont continued the conduct on which the Supreme Court's decision was based at least until 1959 when the first judgment was entered that ordered a change in some of these practices. However, the cases on which plaintiffs rely dealt with criminal conspiracies, which are deemed to continue until abandonment or success. E. g., United States v. Kissel, 218 U.S. 601, 608, 31 S.Ct. 124, 54 L.Ed. 1168 (1910); Hyde v. United States, 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114 (1912); Marino v. United States, 91 F.2d 691, 113 A.L.R. 975 (9th Cir. 1937). The antitrust claims in this case do not involve a conspiracy, and the rule for which plaintiffs contend does not apply. Local 167 of International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America v. United States, 291 U.S. 293, 54 S.Ct. 396, 78 L.[494]Ed. 804 (1934), also relied on by plaintiffs, was a civil antitrust suit subsequent to a criminal conviction. The Court held not that a presumption of continuance exists, but rather that there is *no* presumption that criminal conduct has been *abandoned* after the filing of an indictment.

[11] It may be that plaintiffs may introduce in evidence the decree in the government suit, for historical purposes and background material, which is proper under the usual procedures in antitrust litigation, especially if the case is tried before the court without a jury. Cf. International Shoe Mach. Corp. v. United Shoe Mach. Corp., supra. Plaintiffs, however, will have to submit other proof of the existence of the facts on which they base their claims. Settle order.

APPENDIX B

Section 1 of the Sherman Act, 15 U.S.C. § 1, 26 Stat. 209, provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 2 of the Sherman Act, 15 U.S.C. § 2, 26 Stat. 209, 69 Stat. 282, provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

In 1949 at the time the complaint in the government suit against du Pont was filed, **Section 7 of the Clayton Act, 15 U.S.C. § 18 (1946 ed.), 38 Stat. 731, provided in relevant part:**

> "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

Section 7 as amended in 1950, 15 U.S.C. § 18, 64 Stat. 1125, provides in relevant part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Section 4 of the Clayton Act, 15 U.S.C. § 15, 38 Stat. 731, provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), 38 Stat. 731, provides:

"(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."